Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

STATE OF WISCONSIN,
et al.

Petitioners,

v.

GERALD R. MUELLER,
UNITED STATES DEPARTMENT OF LABOR,
et al.

Respondents.

On Petition for Writ of Certiorari
to the Seventh Circuit Court of Appeals

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JAMES E. DOYLE
Attorney General

RICHARD BRILES MORIARTY
Assistant Attorney General
Wisconsin Department of Justice
123 West Washington Avenue
Madison, Wisconsin 53707-7857
(608) 267-2796

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Gerald R. MUELLER, James A. Andreshak, and Frederick Moeller, on behalf of themselves and all other employees of the State of Wisconsin similarly situated, et al., Plaintiffs-Appellants,

v.

Robert B. REICH, Secretary of Labor, and United States Department of Labor, Defendants-Appellants,

and

Charles H. THOMPSON, Secretary, Wisconsin Department of Transportation; Wisconsin Department of Transportation; et al., Defendants-Appellees.

Nos. 94-3262, 94-3263.

United States Court of Appeals,
Seventh Circuit.
Argued April 5, 1995.
Decided May 15, 1995.
Rehearing and Suggestion for Rehearing En Banc
Denied July 12, 1995.

Before POSNER, Chief Judge, and CUMMINGS and MANION, Circuit Judges.

POSNER, Chief Judge.

This is a class action on behalf of certain engineers employed by the State of Wisconsin, seeking overtime pay to which the plaintiffs claim to be entitled by the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* The Act exempts bona fide executive, administrative, and professional employees, § 213(a)(1); and the state claims, and the district court agreed, that the engineers fall within the exemption. *Mueller v. Thompson*, 858 F.Supp. 885 (W.D.Wis.1994). The class is defined as all state-employed engineers who have been classified as exempt.

The Act does not define the term "executive, administrative, and professional employees," but instead tells the Department of Labor to define it "from time to time by regulations." § 213(a)(1). The Department has done this in a

pair of regulations one of which–the only one we need consider–is known as the "salary basis" regulation. 29 C.F.R. § 541.118. This regulation defines executive, administrative, and professional employees as employees who receive a salary as distinct from an hourly wage–provided (so far as bears on this case) that their pay may not be docked for an absence from work of less than one day and that they are not subject to having less than a week's pay docked for a disciplinary infraction that is not the breach of a major safety regulation. The engineers who make up the plaintiff class are subject to both types of sanction. This may seem to make their case a slam dunk. But in 1992 the Department of Labor created an exception, limited to public employees, to the first proviso and in consequence a public employer may now, without forfeiting its exemption from the Fair Labor Standards Act, dock an employee's pay for missing less than a day's work. 29 C.F.R. § 541.5d. The Department considered whether likewise to make an exception for public employees to the limitation on disciplinary sanctions, but it decided not to. The engineers challenge the new regulation, claiming that the Department is not authorized to treat public employees differently from private ones, but they defend the Department's decision not to go further and differentiate between public and private employers with regard to disciplinary measures. The state, though otherwise pleased with the new regulation, attacks that decision. The district judge rejected the engineers' challenge to the Department but accepted the state's. So the state won the case.

The Department of Labor has managed to inject huge confusion into our appellate review of the district court's decision. The engineers, because they wanted to knock out the new regulation, which had been promulgated by the Department of Labor, named the Department as an additional defendant along with the state. They did not have to do this. The relief they seek is the payment of overtime compensation *by the state*. They ask for nothing from the Department of Labor or any other federal entity. The regulation on which the state relies is an obstacle–that is true. But they could challenge its validity without naming the Department as a defendant. It is utterly commonplace for the validity of

regulations and even statutes to be challenged in private litigation (which from the standpoint of the federal government a suit by private individuals against a state is). See, e.g. *Plaut v. Spendthrift Farm, Inc.*, — U.S. —, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995). That is why, for example, a district court is required to certify a challenge to the constitutionality of a state or federal statute to the state or federal attorney general, respectively, and allow him an opportunity to intervene and defend the statute. 28 U.S.C. § 2403; *Max M. v. New Trier High School District No. 203*, 859 F.2d 1297, 1300 (7th Cir.1988). We know of no similar provision requiring a party who is challenging the validity of a federal regulation in private litigation to name the agency that promulgated or enforces the regulation as a defendant.

At all events, the district judge held the regulation valid and also dismissed the suit, so that the engineers obtained no relief of any sort against the Department. Yet the Department filed a cross-appeal. As the Supreme Court has held, *California v. Rooney*, 483 U.S. 307, 107 S.Ct. 2852, 97 L.Ed.2d 258 (1987) (per curiam), and we tirelessly remind the bar, e.g., *Grinnell Mutual Reinsurance Co. v. Reinke*, 43 F.3d 1152, 1154 (7th Cir.1995); *Warner/Elektra/Atlantic Corp. v. County of DuPage*, 991 F.2d 1280, 1282-83 (7th Cir.1993); *Abbs v. Sullivan*, 963 F.2d 918, 924-25 (7th Cir.1992), and would have expected the agencies of the federal government, at least, to have learned by now, a party is not permitted to appeal or cross- appeal unless it wants the judgment of the lower court modified in some way.

The Department's reason for wanting to cross-appeal is that it is distressed by the district court's ruling that the new regulation, though valid as far as it goes, should have gone even further and exempted public employees from the disciplinary limitation in the salary-based regulation as well as from the prohibition against pay deductions for missing part of a day's work. That ruling is important to the engineers' suit against the state; it doomed the suit. But it did not affect the judgment in the suit against the Department, a judgment of dismissal. A defendant cannot appeal the dismissal of the suit against him on the ground that, in dismissing the suit, the district court said something that may hurt the defendant in a

future case. E.g., *California v. Rooney*, supra, 483 U.S. at 311, 107 S.Ct. at 2854; *Warner/Elektra/Atlantic Corp. v. County of DuPage*, supra, 991 F.2d at 1282-83. That is precisely the ground of the Department's appeal here, as its lawyer acknowledged at the argument. We add that the hurt would be small here because district court decisions are not authoritative as precedents, even at the district court level. *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1124 (7th Cir.1987).

So the cross-appeal was improper, and must be dismissed. What makes it confusing rather than merely superfluous is that the Department, though it manages to avoid saying so, wants the plaintiffs to win their suit against the state. That is, the would-be cross-appellant wants the appellants to win rather than, as is almost always true, to lose. To come within the exemption for executive, administrative, and professional employees, the state must, in the Department's view–and we do not understand any other party to these proceedings to disagree–comply with all parts of the salary-basis regulation (to the extent the regulation is valid, of course), thus including the part limiting discipline; and the state did not comply with that part. But a party cannot appeal from a judgment in its favor merely because it would like the unsuccessful plaintiff to prevail against someone else. *Moy v. Cowen*, 958 F.2d 168 (7th Cir.1992) (per curiam).

The cross-appeal is all the more weird because the Department of Labor is empowered to sue to enforce the Fair Labor Standards Act on behalf of employees aggrieved by violations of the Act and specifically to recover, as their agent, unpaid minimum wages or overtime compensation. 29 U.S.C. § 216(c); see, e.g., *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 293-94, 105 S.Ct. 1953, 1957-58, 85 L.Ed.2d 278 (1985). Indeed, the Act clearly envisions the Department as the primary enforcer. 29 U.S.C. § 217; *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 306-07 (7th Cir.1986); *EEOC v. G-K-G, Inc.*, 39 F.3d 740, 745 (7th Cir.1994) (dictum). Since the Department wanted these employees to win, it could have sued on their behalf, and it should have been realigned with them as a plaintiff. This realignment would have made clear that the Department could not file a cross- appeal in this case.

So let us set the cross-appeal to one side and turn to the merits of the engineers' suit against the state.

The state can prevail only if the current regulation, which is to say 29 C.F.R. § 541.118 as amended by 29 C.F.R. § 541.5d, is valid as far as it goes but should have gone further, that is, should have extended the exemption for public employees to the provision on discipline. We think the regulation is valid, period; and therefore that the engineers must win since the state, it is conceded, did not comply fully and had to do so (provided the regulation is valid) to be entitled to the exemption.

When Congress explicitly delegates responsibility for completing a statutory scheme by defining key terms, here terms on which exemption from the statute's requirements turns, without supplying criteria for the exercise of the delegated responsibility, the scope of judicial review is extremely limited. Judicial review of administrative action typically involves comparing the action with the criteria set forth by the legislature to guide the agency. If there are no criteria, about all the court can do is determine whether the agency's action is rationally related to the objectives of the statute containing the delegation. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 647-52, 110 S.Ct. 2668, 2676-79, 110 L.Ed.2d 579 (1990); *Sullivan v. Everhardt*, 494 U.S. 83, 88-89, 110 S.Ct. 960, 963-64, 108 L.Ed.2d 72 (1990); *Madison Gas & Electric Co. v. EPA*, 25 F.3d 526, 529 (7th Cir.1994). That liberal test is easily passed here, at least with respect to the deduction for absences from work of less than a day.

Remember that the issue is entitlement to overtime pay (at the statutory rate of 1.5 times regular pay). There is little purpose in paying overtime if the express or implied contract of employment does not fix specific hours of work, the employee being expected to do as much work (within reason) as necessary to carry out his responsibilities rather than to work exactly the same number of hours day after day. If the employer docks the employee's pay for an absence of a few hours on a particular day, the implication is that the employee

really is expected to work the same number of hours every day, implying in turn that he really is an hourly rather than a salaried worker and that his salaried status is an evasion of the statute. That is the logic behind the original provision governing absences of less than a full day. But when public employees were placed under the Fair Labor Standards Act (effectively in 1985, when the Supreme Court overruled the *National League of Cities* decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985)), the Department of Labor discovered that states and municipalities, in accordance with the principle of "public accountability," insist that public employees, even if from a functional standpoint they are executive, administrative, or professional employees rather than hourly-wage employees, must account for every hour away from work, either by using accrued leave or if they have none by losing a pro rata portion of their salary. Americans are suspicious of their civil servants, and do not trust those servants to work as many hours as necessary to do the job. They demand "public accountability"–for every minute, or at least every hour. The interaction between this principle, which is deeply embedded in the American political culture, and the original salary-basis regulation, forbidding pay deductions for absences from work of less than a full day, was to bring under the Act workers who in no realistic sense were hourly-wage employees and were therefore outside the Act's intended scope. Hence the new regulation. We cannot say that it is not rationally related to the objectives of the Act. And we can find nothing in the Act's provision on delegation or elsewhere to suggest that the Department of Labor is forbidden to make rational distinctions between public and private employees.

In drafting the new regulation, the Department considered but rejected making a further exception that would permit public employers to dock their employees less than a full week's pay as a penalty for a violation of work rules or other infraction, even if it is not a major safety infraction–for which so light a penalty would usually be inappropriate anyway. Neither the principle of public accountability, nor any other principle of public administration that has been

drawn to our attention, makes it imperative that public employers have this power with respect to their executive, administrative, and professional employees. What is true is that the bar against this range of penalties reduces the employer's disciplinary flexibility, but this is as true for private as for public employers. So far as we know, there is nothing peculiar to the culture or customs or conditions of public employment that necessitates these penalties. We recognize that a higher percentage of public than of private employees have tenure and that it is difficult (quite apart from the rather silly constitutional bar to firing a tenured public employee without giving him due process of law) to fire a public employee; and this makes alternative sanctions more important. But all the challenged rule prevents is suspensions without pay for less than a week, and it is entirely unclear why that should be thought a crippling blow to effective public administration.

Because the rule barring such suspensions does not impose an insuperable obstacle to states' bringing their executive, administrative, and professional employees within the exemption–all the states have to do is to delete this form of discipline from their arsenals of disciplinary remedies–we do not think there is merit to the district judge's suggestion that to subject the states to the rule violates the constitutional guarantee to each state of a republican form of government. U.S. Const. art. IV, § 4. How the clause relates to the employment of engineers is in any event obscure. Since we do not think the Department of Labor's rule inimical to the guarantee clause, we need not speculate on whether the Supreme Court continues to believe that the clause does not create any legally enforceable rights. Compare *Baker v. Carr*, 369 U.S. 186, 218-26, 82 S.Ct. 691, 710-15, 7 L.Ed.2d 663 (1962), with *New York v. United States*, 505 U.S. 144, — - —, 112 S.Ct. 2408, 2432- 33, 120 L.Ed.2d 120 (1992).

It might be possible to question the rationality of the rule with respect to *all* employees, private as well as public, although we do not understand the state to be attempting so broad a challenge. How, it might be asked, does the structure of discipline affect the character of employees as hourly or salaried workers? The only answer that has been suggested or

that occurs to us is that if an employer measures out discipline in the form of fractions of a weekly salary, the implication is that the employee is really being paid on an hourly basis. This is pretty feeble. But apart from the extreme narrowness of the scope of judicial review of the Department's regulation, we do not understand the state to be challenging the disciplinary rule in toto. It is merely challenging the Department's refusal to carve out an exception for public employers. That challenge must fail because the state has not shown what is so special about state employment that makes greater disciplinary flexibility than is permitted to the private sector indispensable to the effective functioning of state government.

The plaintiffs are not exempt from the Fair Labor Standards Act, and the judgment of the district court dismissing their suit must therefore be REVERSED and the case REMANDED to that court for further proceedings in conformity with this opinion. The cross-appeal is DISMISSED.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
July 12, 1995

Before
Hon. Richard A. Posner, Chief Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Daniel A. Manion, Circuit Judge

GERALD R. MUELLER, JAMES A. ANDRESHAK, and FREDERICK MOELLER MOELLER, on behalf of themselves and all other employees of the State of Wisconsin similarly situated, *et al.*, *Plaintiffs-Appellants,*	) Appeals from the United) States District Court) for the Western District) of Wisconsin.)) No. 92 C 891)
Nos. 94-3262, 94-3263 v.	) Barbara B. Crabb,) *Chief Judge*
ROBERT B. REICH, Secretary of Labor, and United States Department of Labor, *Defendants-Appellants,* and CHARLES H. THOMPSON, Secretary, Wisconsin Department of Transportation; Wisconsin Department of Transportation; *et al.*, *Defendants-Appellees.*	))))))))))))

ORDER

On May 30, 1995, defendants-appellees filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

Gerald R. MUELLER, James A. Andreshak, Frederick Moeller, David Tamblyn, David Dahlk, Melvin Sensenbrenner, Richard Nelson, Roger Bohn, David Buschkopf, Curtis Paulson, Thomas M. Stemrich, Terry D. Cook, Gerard Swim, Robert Grosch, and Vernon Carlson, on behalf of themselves and all other employees of the State of Wisconsin similarly situated, and the State Engineering Association,

Plaintiffs,

v.

Charles H. THOMPSON, Secretary, Department of Transportation; Department of Transportation; James R. Klauser, Secretary, Department of Administration; Department of Administration; George Meyer, Secretary, Department of Natural Resources; Department of Natural Resources; Gerald Whitburn, Secretary, Department of Health and Human Services; Department of Health and Human Services; Carol Skornicka, Secretary, Department of Industry, Labor and Human Relations; Department of Industry, Labor and Human Relations; George K. Steil, Sr., President, Boards of Regents of the University of Wisconsin; Board of Regents of the University of Wisconsin; Jon E. Litscher, Secretary, Department of Employment Relations; Department of Employment Relations; State of Wisconsin; Robert Reich, Secretary, United States Department of Labor; United States Department of Labor, Defendants.

No. 92-C-891-C.

United States District Court,
W.D. Wisconsin.

July 22, 1994.

OPINION and ORDER

CRABB, Chief Judge.

This is a class action for declaratory relief and money damages brought under the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 by certain employees of the state of

Wisconsin who are classified as exempt from the overtime pay provisions of the FLSA. Plaintiffs allege that all of the defendants except Robert Reich and the United States Department of Labor (1) classified the individual plaintiffs improperly as "exempt" employees under the FLSA and have not paid them the overtime pay to which they are entitled for all the hours they worked in any week in excess of 40 during the period from December 3, 1989 to date; and (2) knew of the overtime requirements of the Fair Labor Standards Act, 29 U.S.C. § 207, and demonstrated reckless disregard for plaintiffs in failing to pay them overtime wages. Not alleged in the complaint but agreed upon at a conference held pursuant to Fed.R.Civ.P. 16 is plaintiffs' claim that the state defendants have threatened retaliation against plaintiffs for bringing suit on their FLSA claims.

At issue are the state defendants' policies of requiring employees classified as exempt to charge their personal absences to accrued leave and subjecting these employees to disciplinary suspensions of less than one week. Plaintiffs contend that under these policies, they cannot be considered exempt employees because they are subject to reductions in pay in violation of the "salary basis" test that the United States Department of Labor developed fifty years ago for determining when managerial level employees were to be exempted from the requirements of the FLSA. Under these regulations, employees are considered to be salaried and therefore eligible to be treated as exempt executive, administrative or professional employees if, among other things, they receive a set amount of money that does not depend on hours worked or amount of work accomplished and that is not subject to deductions in pay either for personal absences less than a full day in length or for disciplinary penalties of less than one week imposed for infractions of work rules unrelated to major safety concerns. 29 C.F.R. § 541.118. Plaintiffs maintain that the state defendants are required to treat the employees subject to these policies as nonexempt employees entitled to be paid overtime for hours worked in excess of 40 in any workweek.

The salary basis test was promulgated with only private sector employment in mind because at the time the FLSA did not extend to governmental employees. Plaintiffs' suit raises

the question of the extent to which the test applies to the state, local and federal government employees to whom the FLSA has been made applicable in recent years. Plaintiffs contend that the test applies in the same manner to private and public sector employees. They maintain that the federal defendants, Robert Reich and the United States Department of Labor, acted beyond their authority in 1992, when they promulgated 29 C.F.R. § 541.5d, which changes one aspect of the salary basis test as applied to state and local government employees. The new regulation provides that exempt employees in the public sector will not lose their exemptions if their pay is reduced after they exhaust their accrued leave time or take personal leave without permission, provided that the pay system in effect is governed by principles of public accountability permitting employees to accrue leave time and requiring them to use their accrued leave for personal absences. The regulation does not change the prohibition against disciplinary suspensions of less than a week. Plaintiffs contend that the federal defendants acted arbitrarily in creating an exception that allows public employees to be treated differently from private employees for the purpose of applying the salary basis test as it relates to the use of accrued leave time. The state defendants contend that the salary basis test does not apply to state and local governments except as it has been amended in § 541.5d to reflect the demands of public accountability upon state and local governments both because Congress never intended that it would apply and because application of the test to governmental entities would raise serious constitutional questions.

The case is before the court on cross-motions by all parties for summary judgment or for partial summary judgment on the liability issues. I conclude that (1) plaintiffs have failed to show that defendants Reich and the United States Department of Labor acted illegally in promulgating 29 C.F.R. § 541.5d; (2) plaintiffs have failed to show that they lost their exempt status simply because the state defendants required them to use accrued leave time for absences of less than a full day; (3) the salary basis test in § 541.118(a) cannot be applied to state and local government employees except as it has been amended by § 541.5d because it conflicts with congressional

intent; (4) plaintiffs chose to waive their claims of willfulness in return for the state defendants' agreement that they would not contest the application of the three- year statute of limitations; and (5) plaintiffs have failed to show that the state defendants either retaliated against them or threatened to do so for bringing this suit.

For the purpose of deciding these motions, I find there is no genuine dispute with respect to any of the following material facts.

UNDISPUTED FACTS

The Parties

Each of the individual plaintiffs is or was employed by the state of Wisconsin during the relevant time period and has been treated by the state defendants as an exempt employee under the provisions of 29 U.S.C. § 213(a)(3). Except for defendants Robert Reich and United States Department of Labor, defendants are either state agencies or heads of state agencies. Defendant Robert Reich is Secretary of the United States Department of Labor. He and the department administer the Fair Labor Standards Act. On August 19, 1992, these defendants promulgated 29 C.F.R. § 541.5d, which became effective September 18, 1992.

Since at least December 1, 1989, each individual plaintiff has been paid a predetermined amount greater than $1000.00 for each biweekly pay period constituting part or all of that plaintiff's compensation for all work weeks during which that plaintiff performed work and was categorized as exempt under the provisions of the FLSA. In addition, since July 1, 1973, state engineers, such as plaintiffs, have received straight time overtime for work performed in excess of 40 hours a week, as a consequence of a study showing that the state was losing skilled engineers to the higher-paying private sector. Straight time overtime is now incorporated into the collective bargaining agreement between the state and plaintiff State Engineering Association.

The predetermined amount paid to each plaintiff has not been subject to reduction because of variations in either

the quantity or quality of work performed by that plaintiff. However, in every pay period, plaintiffs have been required to charge personal absences of less than a day to compensated leave balances.

Wisconsin Personnel Policies

Under Chapter 504 of the Wisconsin Personnel Manual, the state uses an Official Hourly Rate to calculate the rate of pay of all state employees including the governor and excluding only the nonclassified employees of the University of Wisconsin, regardless whether the employees are salaried and "exempt" or paid on an hourly basis and nonexempt under the FLSA. Use of this rate facilitates accurate record keeping and calculations and promotes administrative convenience and uniformity.

State engineers are eligible for straight time overtime. In order to establish their eligibility for this overtime pay and because many of them are working on projects funded by program revenue or federal money and requiring documentation of time and attendance of employees for auditing purposes, state engineers must keep accurate records of the time they work.

The state has a long-established policy requiring its employees to account for any non-work-related absences from the work place, including those of less than one full day.

As set forth in pages 4 through 6 of Chapter 516 of the Wisconsin Personnel Manual, since at least April 15, 1986, the state has prohibited all state agencies from deducting pay for personal absences from work of less than one day from the salaries of any employee considered exempt under 29 U.S.C. § 213(a)(3).

The Wisconsin Department of Employment Relations employs a compensation analyst to monitor partial-day pay deductions for all FLSA-exempt state employees other than those employed by the University of Wisconsin System. If any employing agency deducts pay from any exempt employee for an absence of less than a full day, the employing agency is sent a standard form letter advising it of the prohibition on pay deductions for absences of less than one day. The University

of Wisconsin-Madison has monitored its employees in the same manner since at least April 15, 1986.

The state of Wisconsin has a policy of imposing uniform discipline upon all employees whether they are represented or unrepresented, management or nonmanagement. As an employer, the state is obliged to establish fair and reasonable work rules for all employees and to establish and administer a fair and reasonable system of discipline for employees who violate work rules, state law or federal law. In determining appropriate discipline in any given case, the state employer must impose discipline that is fair, appropriate to the circumstances, and not excessive. This goal remains the same whatever the employee's status. Differentiating in the application of discipline between represented and unrepresented employees or between exempt and nonexempt employees would risk undermining the validity of the discipline, violating the state's labor relations laws, creating dissension and morale problems among the state's work force and violating the employees' equal protection rights under the state and federal constitutions.

The FLSA status of an individual employee of the state of Wisconsin is not determined solely from the classification of the position held. Exceptions to the usual treatment of employees in a "class title" as exempt or nonexempt are made in appropriate instances and are based on the duties and responsibilities of the individual employee.

Instances of Pay Deductions

Of all state employees who have engineering classifications, with the exception of named plaintiff David A. Russell and class member Terry D. Cook, only three employees have had pay deducted for an absence from work of less than one day since December 1, 1989. (1) Thomas Peronto, Department of Transportation, was listed as having had four hours deducted during the two-week pay period ending August 10, 1991; this apparent deduction was actually a mathematical error in Peronto's leave accounting balance. No actual pay was deducted from his salary. (2) Larry Legro, Department of Health and Social Services, had 5.5 hours

deducted during the pay period ending April 18, 1992; this was an inadvertent error that was corrected in the pay period ending 5/16/92. (3) Karen Lynn Olson was listed as having a payroll deduction for a partial-day absence; the deduction resulted from Olson's request to work at home part-time during an extended maternity leave. In return for the accommodation of her request, she agreed to waive all rights under the Fair Labor Standards Act during this pay period.

On one or more occasions, plaintiff Terry Cook has been disciplined by the department in which he works for using sick leave for absences from work when his supervisors did not believe him to be sick. During the pay period ending December 1, 1990, he was charged with 2.75 hours of leave without pay and during the pay period ending October 19, 1991, he was charged with 21 hours of leave without pay. He has filed a grievance, which is pending. Plaintiff Cook did not work any overtime during the two pay periods for which he received the leave without pay deductions.

During the pay period ending March 21, 1992, class member David Russell received an eight hour leave without pay deduction from his salary. This deduction represented a disciplinary suspension for leaving a training session midway during the presentation and not returning to work. During the pay period ending December 12, 1992, Russell's salary was reduced by 3.5 hours of leave without pay to account for the time in which he was absent from the training session but did not take any form of personal leave. During the two weeks for which Russell received the leave without pay deductions, he did not work any overtime.

Threatened Consequences

For many of the jobs held by plaintiffs, the state has made it a requirement that the persons holding them meet the criteria for entitlement to a professional exemption under the FLSA.

In an affidavit sworn to on December 18, 1992, Judith A. Burke, a classification analyst for the Wisconsin Department of Employment Relations, averred that if a court were to determine that employees serving in the positions of

classifications of civil engineers at issue in this suit were not exempt from the overtime pay provisions of the FLSA, the Department of Employment Relations would be required to review the positions of all state employees currently holding positions in those classifications to determine the appropriate "non-professional" classification series for each position, and to place each position in the appropriate classification, union and bargaining unit.

In a brief filed with this court, counsel for defendants referred to "clear adverse consequences which many potential plaintiffs already perceive and which the named plaintiffs have disparaged or denied...." In various other submissions to the court, both written and oral, counsel for defendants has expressed concern that plaintiffs be made aware of the possible adverse consequences that could follow upon a determination that plaintiffs must be treated as nonexempt under the FLSA. In counsel's view, these consequences could include reclassification and removal from the bargaining unit.

ADDITIONAL FACTS

At a conference held on December 8, 1993, pursuant to Fed.R.Civ.P. 16, plaintiffs stipulated to abandoning their claims that the state defendants had either created job classifications without conducting the inquiry required under the FLSA to determine the status of each individual position or had designed job classifications in ways that discouraged employees from asserting their rights under the FLSA or both. In return, defendants agreed not to contest the application of the three-year statute of limitations. (Ordinarily, plaintiffs must make a specific showing of willfulness on the part of the employer to establish their eligibility for the three-year statute to apply in place of the two-year statute.) 29 U.S.C. § 255(a).

OPINION

A. *Background*

When it enacted the Fair Labor Standards Act in 1938, Congress imposed the requirement that employers pay one and

one-half the regular rate of pay to employees who work more than forty hours in any work week, 29 U.S.C. § 207(a)(1), but exempted from this requirement persons employed in a "bona fide executive, administrative or professional capacity." 29 U.S.C. § 213(a). Congress delegated to the Secretary of the Department of Labor the task of defining "executive, administrative and professional." Id. In 1940, the department promulgated regulations defining an employee in an executive, administrative or professional capacity as one who performs certain duties and has certain specified responsibilities, and "is compensated for his services on a salary or fee basis...." 29 C.F.R. §§ 541.1(f), 541.2(e)(1), 541.3(e)(1). In addition, the regulations required that the exempt employee receive a certain minimum salary, which under the current regulations is at least $155 a week. 29 C.F.R. § 541.17. Employees are considered to be paid on a "salary basis" if they regularly receive a predetermined amount constituting part or all of their compensation, "which amount is not subject to variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118(a). Deductions may be taken from the pay of an exempt employee for personal absences without violating the salary basis test only if the deductions are taken for absences of more than a day. *Id.* Also, deductions may be taken for infractions of work rules if the deductions are for a week or longer or if they are imposed for infractions of major safety rules.

In 1938, when the FLSA was first enacted, it did not apply to employees of state and local governments. In 1966, Congress withdrew the minimum wage and overtime exemptions for employees of public hospitals, schools and certain mass transit carriers. This extension of the FLSA was held to be a constitutional exercise of Congress's commerce clause power. *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968). In 1974, however, when Congress extended FLSA coverage to almost all state and local government employees, the Supreme Court reversed course in part and held the extension unconstitutional to the extent it applied to the "traditional governmental functions of state and local governments." *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). Fewer than

ten years later, the Court overruled National League of Cities in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 533, 105 S.Ct. 1005, 1008, 83 L.Ed.2d 1016 (1985), holding that it was impossible to distinguish "traditional" and "non- traditional" government functions in a principled manner consistent with the principles of federalism. *Garcia*, 469 U.S. at 537-47, 105 S.Ct. at 1010- 15. Abjuring the effectiveness of "judicially created limitations on federal power," the Court held that the protection of state sovereignty interests was properly left to the "procedural safeguards inherent in the structure of the federal system." *Id.* at 552, 105 S.Ct. at 1018.

After *Garcia* was decided in 1985, Congress amended the FLSA to provide a temporary adjustment period for state and local governmental employers. Pub.L. 99-150, 99 Stat. 787 (1985). Recognizing that governmental employers were concerned about the existing salary basis test because they were prohibited by state and local law from paying employees for time not worked, the Wage and Hour Administrator of the Department of Labor announced that the department would adopt a nonenforcement policy with respect to the "salary basis" test as applied to government employees until the department could make appropriate changes. See discussion in 57 Fed.Reg. 37668. However, the administrator stated expressly that the division's nonenforcement policy was not intended to affect the rights of public employees to file private lawsuits. Id. Many such lawsuits were filed, with widely divergent results. *Id.* See, e.g., *Atlanta Professional Firefighters Union, Local 134 v. Atlanta*, 920 F.2d 800 (11th Cir.1991) (salary not subject to deductions and employees do not lose their eligibility for exempt status if no evidence that salary ever reduced in fact; mere possibility of reduction is not a violation of salary basis test); *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir.1990) (possibility that salary may be reduced defeats exempt status) (dictum), *cert. denied*, 498 U.S. 1068, 111 S.Ct. 785, 112 L.Ed.2d 848 (1991). Finally, on September 6, 1991, acknowledging belatedly the potential liability that "threatened to impair the fiscal integrity of many State and local governmental agencies," id., the Department of Labor promulgated an interim final rule "to provide an exception from certain provisions requiring payment 'on a

salary basis' applicable only to public sector employees." 56 Fed.Reg. 45824. Under this rule, otherwise exempt public employees would not lose their exempt status even if they were paid according to a pay system that required deductions for periods of less than a day when no leave was available. *Id.* at 45826. Plaintiffs contend that this interim rule was not promulgated properly and should not be given any credence. The federal defendants disagree, pointing out that they were not parties to the cases cited by plaintiffs and thus had no opportunity to argue the legality of the interim regulations. As will be seen in the discussion that follows, it is unnecessary to decide the legality of the interim regulations at this time.

On August 19, 1992, the department issued its final rule, which provides that employees of public agencies are not disqualified from exempt status simply because they are paid according to a pay system "established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability," under which the employees accrue leave time and have their pay reduced or are forced to take leave without pay for partial-day absences for personal reasons, illness or injury when (1) they do not use accrued leave because they have not sought permission for use of leave time or have sought permission and been denied it; (2) they have exhausted their leave; or (3) they choose to use leave without pay. 29 C.F.R. § 541.5d. The federal defendants have explained that they proposed § 541.5d because they realized that the existing "regulations were ... out of harmony with the intent of the statute because State and local governments could not avail themselves of the exemption intended by Congress, and thus were inappropriate as applied in the public sector." 57 Fed.Reg. 37672.

The promulgation of § 541.5d does not resolve all of the questions raised in attempting to apply the salary basis test to public employees. The regulation deals only with the use and exhaustion of accrued leave time; it does not address the question of disciplinary deductions. (Although a number of commentators had asked for modification of this provision during the comment period provided in connection with § 541.5d, the department deferred taking any action because the provision of the salary basis test concerning disciplinary

deductions, § 541.118(a)(5), was not open for comment at that time. 57 Fed.Reg. 37674.) In addition, there remains the question whether otherwise exempt employees who were required to use accrued leave time between 1985, when Garcia was decided, and 1991, when the interim rule was promulgated, are to be considered exempt or nonexempt during that period. Finally, there is the question raised by plaintiffs in this case whether the promulgation of § 541.5d was within the authority of the department. I begin with this last question.

B. *Validity of 29 C.F.R. § 541.5d*

In contending that the Secretary exceeded his authority in promulgating § 541.5d, plaintiffs are swimming against the tide. When Congress has made an express delegation, as it did here in directing the Secretary to define the terms "executive," "professional" and "administrative" from time to time by regulations, 29 U.S.C. § 213(a)(1), a reviewing court can set aside the resulting regulations only if it finds that the Secretary "exceeded his statutory authority or if the regulation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Batterton v. Francis*, 432 U.S. 416, 426, 97 S.Ct. 2399, 2406, 53 L.Ed.2d 448 (1977) (quoting 5 U.S.C. §§ 706(2)(A), (C)). See also *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984) (same). Delegation of a specific task almost ensures approval of the result; the courts must accept any reasonable exercise of the delegated discretion. *Reich v. State of New York*, 3 F.3d 581, 587 (2d Cir.1993) (citing *Batterton*, 432 U.S. at 425 n. 9, 97 S.Ct. at 2405 n. 9), *cert. denied*, — U.S. —, 114 S.Ct. 1187, 127 L.Ed.2d 537 (1994).

Plaintiffs maintain that the Secretary acted in contravention of congressional intent when he promulgated two different salary basis tests for public and private employees. Plaintiffs draw the inference that Congress intended no distinction between public and private employees from two sources: Congress's failure to make any such distinction when it first extended the FLSA to public sector

employees and its failure to make any changes in the provisions for determining whether employees qualified as executive, administrative or professional in 1985, when it amended the FLSA to address particular concerns of state and local governments. Plaintiffs argue that these omissions are significant because Congress could have made specific accommodations for state and local governments if it had believed such accommodations were necessary.

Plaintiffs' argument misapplies the principle of statutory construction that the specification of certain things implies that others are intended to be excluded ("expressio unius est exclusio alterius"). The maxim is "notoriously unreliable," *Custis v. United States*, — U.S. —, —, 114 S.Ct. 1732, 1741, 128 L.Ed.2d 517 (1994) (Souter, J., dissenting), because it "rests on the assumption that all omissions in legislative drafting are deliberate, an assumption we know to be false." *Id.* See also *In the Matter of American Reserve Corp.*, 840 F.2d 487, 492 (7th Cir.1988) (omission "may show that Congress has not grappled with the problem"); *Illinois Dep't of Public Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir.1983) ("not every silence is pregnant"). In arguing for the drawing of an inference of Congress's intent not to act from its failure to act, plaintiffs ignore the context in which the legislation was passed. They fail to consider that Congress had delegated to the Secretary the task of defining exempt employees and therefore, had no reason to focus on how that the definition would be interpreted to apply to the public sector. Moreover, plaintiffs ignore the strong evidence that Congress would not have intended that public employees would be treated in the same manner as private employees if the result would be the elimination of exemptions for public employees. Such a result would contravene Congress's stated intention that the exemptions under the FLSA for supervisory employees are available for public sector employees. H.R.Rep. No. 93-913, 93d Cong.2d Sess. 27 (1974), *reprinted* in 1974 U.S.C.C.A.N. 2811, 2837:

> Section 6 of the bill extends minimum wage and overtime coverage to about 5 million *non-supervisory* employees in the public sector not now covered by the [FLSA].... The bill will

> provide that virtually all *non-supervisory* government employees will be covered...." By the same token, the committee intends to cover all employees (*except professional, executive, and administrative personnel who are exempted under section 13 of the law*) in all civilian branches of the Federal Government.

(Emphasis added). Writing in the Columbia Law Review, Deborah Jones Merritt suggests that Congress's reasons for exempting managerial level employees went beyond mere desire for parity between the public and private sectors to recognition of the limits of federal power under the guarantee clause, Art. IV, sec. 4, to regulate the wages and hours of the persons who possess and exercise the powers of republican government within the states. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Decade*, 88 Colum.L.Rev. 1, 56-57 (1988).

The Secretary has acknowledged that preserving an exemption for supervisors in the public sector would be impossible unless accommodation were made for the needs of local governments to be accountable to the public in their pay practices. 57 Fed.Reg. 37667. Without such an accommodation, the consequence would have been a public employee work force with few exempt employees or none at all and a private sector with its full complement of exempt employees. Such a result would constitute a clear frustration of congressional intent and perhaps, of the Constitution's promise to secure to the states the autonomy to maintain a republican form of government, that is, a government in which the people of the state determine the hours and wages of the state employees who exercise the executive, judicial and legislative functions of state government.

Plaintiffs' arguments suggest a lack of understanding of the purpose of the salary basis test. Essentially, it is a tool for distinguishing between truly salaried, supervisory and professional employees and those who are nonsalaried and nonsupervisory. It is intended to reflect the realities of the work place. The regulatory interpretation of salary basis in existence until 1991 dates back to 1954 and reflects the results of public hearings held in the 1940's and 50's, when

testimony and other evidence were taken from representatives of private industry to determine actual pay practices as they existed in private industry at the time. 57 Fed.Reg. 37666. That evidence indicated that "employees who did not meet the salary test generally also did not meet the other requirements of the exemption." *Id.* at 37672. It was the Secretary's determination in 1954 that the salary basis test was consistent with bona fide employment practices in the private sector; in other words, it was an accurate indication of the way private industry treated its supervisory employees.

It is instructive to note that during World War II, employment policies in the private sector changed as it became common for employers to make disciplinary pay deductions to deter absenteeism. During this period, the Department of Labor changed its regulations to reflect the fact that such deductions were not inconsistent with payment on a salary basis. After the war ended, the practice of disciplinary pay deductions ended and the regulations were revised again to reflect the changed practices. Report and Recommendations on Proposed Revisions of Regulations, Part 541 at 24-25 (Department of Labor, June 1949).

When the FLSA was extended to public sector employees in 1985, it became apparent to the Department of Labor that practices in the private sector could not be carried over to the public sector without amendment, because of "the public accountability principles prevalent in public sector pay systems." 57 Fed.Reg. 37672. Unlike private employees, most public sector employees are subject to requirements that they use accrued leave time when they are absent from work for less than a day. *Id.* To this extent, the salary basis test that reflected the actual working of the private sector in the 1940's and 50's fell short as a guide for the public sector's treatment of its supervisors. The test needed amendment if it was to serve its purpose as a shorthand method of identifying actual administrative, executive and professional level employees in the public sector. In amending the regulations to give a more accurate reflection of the employment practices of governments, the federal defendants acted in accordance with the long-settled practice of the Secretary, which was incorporated in a regulation promulgated on October 20,

1938, that "[i]n determining ... future regulations, separate treatment for different industries and for different classes of employees may be given consideration." 29 C.F.R. § 541.5 (3 Fed.Reg. 2518) (1938); 29 C.F.R. § 541.6 (1993).

The promulgation of § 541.5d was necessary to carry out Congress's intention to make the supervisory exemptions of the FLSA available to state and local governments and to avoid potential constitutional problems. The regulation is a reasonable and necessary response to a difficult problem created by the extension of the FLSA to state and local government employees. The federal defendants are entitled to summary judgment on the claim that § 541.5d is invalid because it distinguishes between private and public sector employees with respect to the use of accrued leave.

C. Accrued Leave Policy Before Enactment of § 541.5d

Plaintiffs have challenged only two aspects of the state defendants' pay policies as violating the salary basis test: the required use of accrued leave time for personal absences and the imposition of disciplinary sanctions of less than a week. They do not attack the state's decision to give plaintiffs straight overtime pay as a means of making their salaries competitive with the private sector and they have abandoned any claim that the duties they actually perform do not meet the duties tests for exempt positions set out in 29 C.F.R. §§ 541.1, 541.2 and 541.3.

It is plaintiffs' contention that even if § 541.5d is valid, the state defendants were in violation of the accrued leave provisions of the salary basis test until § 541.5d was promulgated in September 1992. They concede that the state defendants have not reduced the pay of any of the plaintiffs for taking leave after exhausting their accrued leave time, but they contend that the state defendants have been violating the test by requiring employees classified as exempt to charge personal, partial-day absences to their accrued leave accounts. Citing *Klein v. Rush-Presbyterian-St. Luke's Medical Ctr.*, 990 F.2d 279 (7th Cir.1993), plaintiffs argue that employees required to account for their personal leave time cannot be considered to be exempt from the FLSA. Plaintiffs are

contending that for the period December 3, 1989 to September 1992, they are entitled to overtime pay for any weeks during this period in which they worked more than 40 hours because they were required to use accrued leave accounts for partial day personal absences during this period.

In *Klein*, the court of appeals held that the "professional" exemption under the FLSA did not apply to a nurse in private employment who was required to use compensatory time for personal absences, while her immediate supervisors were not, and who was subject to disciplinary suspensions for minor infractions. Although Klein's employer had a policy of never reducing pay when an employee used leave time beyond what she had accrued, the court of appeals held that the mere requirement that she use her accrued leave time was a form of deduction in pay. "When Klein was forced to go into negative comp time, she may not have been actually paid less, but she was going into a form of debt...." *Klein*, 990 F.2d at 284. The court of appeals emphasized the fact that Klein's supervisors were not subject to the comp time policy. *Id.*

In relying on this holding, plaintiffs downplay the fact that *Klein* concerned an employee in the private sector. Plaintiffs emphasize that the court of appeals relied for its holding on a number of cases involving governmental employees. They argue that the court of appeals would reach the same holding in this case, but their argument is not persuasive. Most public employers have compensation systems requiring "all employees, regardless of how paid, to use accrued leave time or incur a reduction in pay for any absences." 57 Fed.Reg. 37667. If all or most employees in the public sector must use compensatory time for personal absences, the fact that any one employee is required to do so does not help the fact finder determine whether the employee is viewed (and treated) by the employer as holding a bona fide professional, executive or administrative position. *Id.* at 37670 (certain aspects of the salary basis test "are not valid indicators of the bona fides of a claimed exemption under [29 U.S.C. § 213(a)(1)] in the public sector where every employee may theoretically be subject to potential docking for partial-day absences"). In *Klein*, by contrast, the mandatory use of

compensatory time for personal absences was a means of distinguishing lower level, nonmanagement employees from others, such as Klein's immediate supervisors.

In addition, the court of appeals would likely give weight to the Secretary of Labor's view, expressed in § 541.5d, that the required use of accrued leave time by government workers does not affect the amount of pay such workers receive. The new regulation casts doubt on the holdings relied on by the court of appeals in *Klein*, 990 F.2d at 284, to the effect that reduction of leave time is the equivalent of a reduction in pay even though pay is not actually reduced. See *Abshire v. Kern*, 908 F.2d at 487 n. 3; *Benzler v. Nevada*, 804 F.Supp. 1303, 1306 (D.Nev.1992); *Aaron v. Wichita*, 797 F.Supp. 898, 907 (D.Kan.1992); *Service Employees Int'l Union, Local 102 v. County of San Diego*, 784 F.Supp. 1503, 1510 (S.D.Cal.1992).

It is noteworthy that the Court of Appeals for the Ninth Circuit has disavowed its dictum in *Abshire*, 908 F.2d at 487 n. 3. Many courts had relied on this dictum, which suggested that an express policy of deducting from public employees' accrued paid leave for absences of less than one day might violate the salary basis test, even if such deductions were never made. These courts had held that such deductions do violate exemption. *See, e.g., Fleming v. Carpenters/Contractors Cooperation Comm.*, 834 F.Supp. 323 (S.D.Cal.1993) (requiring employees to use accrued leave for partial-day absences violates salary basis test). *See also Benzler*, 804 F.Supp. 1303; Aaron, 797 F.Supp. 898; *Service Employees*, 784 F.Supp. 1503. In a recent opinion, *Barner v. City of Novato*, 17 F.3d 1256 (9th Cir.1994), the court of appeals affirmed the district court's holding that "deductions from the paid leave banks of the Plaintiffs for absences of less than one day did not constitute impermissible deductions from 'salary' as defined in 29 C.F.R. 541.118." *Id.* at 1261. Basing its decision on the holding that the words "amount" and "compensation" in the salary basis test set out in 29 C.F.R. § 541.118(a) refer to "cash" or "salary," the court held that a reduction in paid leave time does not affect the amount of an employee's compensation paid to him regularly; therefore, requiring a public employee to use accrued leave for personal

absences does not affect his status as a salaried employee. In reaching this conclusion, the court noted expressly that it was rejecting the holdings of *Benzler*, *Fleming*, and *Service Employees*. Given this disavowal of the *Abshire* dictum, it is unlikely that in a case involving public employees the Court of Appeals for the Seventh Circuit would reach the same conclusion it reached in *Klein* that the required use of accrued leave is equivalent to a deduction in pay.

Again citing *Klein*, 990 F.2d 279, plaintiffs raise a second contention: that because they were always "subject to" an actual reduction in pay if they exhausted their "accrued leave," they never met the requirements for exempt employees. Addressing disciplinary suspensions for minor infractions, a different issue, the court of appeals held in *Klein* that such a suspension and resulting reduction in pay need not actually have occurred before the practice could be said to violate the statute: "it is enough that the deduction could have been made for an impermissible reason." *Id.* at 286.

A number of courts have held in government employee cases that the mere possibility that salary might have been reduced for partial day absences did not make the salary "subject to" such reductions if the reductions were never taken. *See, e.g., McDonnell v. City of Omaha*, 999 F.2d 293, 297 (8th Cir.1993) (declining to read "subject to" language of regulation as meaning that possible or contingent reduction in salary automatically means pay is "subject to reduction"); *York v. City of Wichita Falls*, 944 F.2d 236 (5th Cir.1991) (executive status not necessarily defeated by subjecting pay to reductions if reductions never actually taken); *Atlanta Professional Firefighters Union*, 920 F.2d at 805 (salary not subject to deduction if deduction never taken); *Harris v. District of Columbia*, 709 F.Supp. 238, 241-42 (D.D.C.1989) (same). *See also Michigan Ass'n of Governmental Employees v. Michigan Dep't of Corrections*, 992 F.2d 82 (6th Cir.1993) (although leave policy could be read as requiring docking of pay when accrued leave exhausted, policy language was ambiguous; fact that no employee had ever been docked pay under this policy persuades court that employees were not "subject to" reduction in pay before September 1, 1991, when Secretary promulgated interim salary basis test).

In this case there is no ambiguity about the policy and not even a possibility that reductions would be made. The clear language of the state regulations prohibited reductions and state employees monitored payrolls to ensure that none were ever made. I conclude that even before 1991, the salary basis test in § 541.118 was not violated by the state defendants' policy requiring employees to charge partial-day absences to accrued leave accounts. Moreover, even if the state defendants' policies did not fulfill the requirements of the salary basis test, I would not hold that the state defendants had forfeited their right to claim an exemption for plaintiffs. As the Department of Labor explained in promulgating § 541.5d, Congress never intended to require state and local governments to chose between their obligation to remain accountable to the public and their ability to make use of the FLSA's managerial exemption. Therefore, the regulation would be invalid as applied to the public sector because it contravenes congressional intent. *Chevron U.S.A.*, 467 U.S. at 843 and n. 9, 104 S.Ct. at 2781-82 and n. 9 (as final authority on issues of statutory construction, judiciary "must reject administrative constructions which are contrary to clear congressional intent").

D. *Application of 29 C.F.R. 541.118(a)(5) to State and Local Governments*

The salary basis test, § 541.118, requires that an exempt employee "must receive his full salary for any week in which he performs any work," subject to a few exceptions. Among these are § 541.5d, discussed above, and the provision in subsection (5) of § 541.118 that penalties imposed in good faith for infractions of safety rules of major significance may be deducted from the salaries of exempt employees without affecting their exempt status. Although subsection (5) does not say explicitly that exempt status will be lost if deductions are taken for other infractions, the only logical reading of the subsection is that the salary basis test is violated by the imposition of a penalty suspension without pay of less than a week, unless the penalty is imposed for the violation of a major safety rule. *See Klein*, 990 F.2d at 285 (citing Wage &

Hour op. letter No. 90-42NR (Mar. 29, 1991)) (only disciplinary type of deduction permissible is one imposed as penalty for violations of major safety rules).

Class member Russell received a deduction from his pay as a penalty for an infraction not involving a safety rule. Plaintiff Cook may receive such a deduction, depending on the outcome of his grievance proceeding. Plaintiffs contend that the imposition of such a penalty on Russell is evidence that the state defendants have been treating all the plaintiffs as nonexempt employees for the three years preceding the filing of this suit and for all the time since then. They argue that the disciplinary suspension imposed on Russell shows that it was always possible that an otherwise exempt employee would receive a disciplinary suspension of less than a week.

The state defendants do not argue that Russell's suspension was inadvertent or that the disciplinary policy is no longer operative. To the contrary, they argue forcefully that they have an obligation to continue to impose such discipline when it is warranted if they are to remain accountable to the public. They cite the constraints of the equal protection clause as well, which they say requires them to treat exempt and nonexempt employees alike in imposing disciplinary suspensions.

If this case arose in a private employment context, the holding in *Klein*, 990 F.2d 279, would dictate the conclusion that employees "subject to" the same kind of discipline Russell received cannot be considered to be exempt under the FLSA. The court's holding is explicit: when employees are subject to reductions in pay because of partial-week suspensions that are related to the quality or quantity of their work, they do not meet the salary basis test set out in § 541.118(a). It is not necessary that they actually have had deductions made in their salary; "it is enough if the deduction could have been made for an impermissible reason." *Id.* at 286.

Klein forecloses most of the arguments that the state defendants might make to support their position that the possibility of disciplinary suspensions should not endanger an employee's exempt status. Chief among these is that the regulation should not be applied mechanically without considering the purpose of the salary basis test. *Klein*, 990

F.2d at 285. Klein's employer argued that "disciplinary deductions which are actually salary deductions are prohibited by the safety rules section while legitimate unpaid suspensions not meant as impermissible salary deductions should not be proscribed by the section." *Id.* Another way of saying this is that the salary basis test is designed to prevent an employer from treating its employees as hourly workers while classifying them as exempt. If the employees have their pay docked for being late to work, or not being at their desks from nine to noon, or not finishing a specified amount of work, then the penalties are being used in a manner inconsistent with exempt status. On the other hand, the argument goes, if the penalties are imposed only for such serious work rule violations as lying about work-related matters, forging documents, or sexually harassing a co-worker, they are imposed for reasons that have nothing to do with whether the employee should be classified as exempt or nonexempt. The court of appeals rejected this argument in *Klein*, although it is not clear whether it did so on the merits or simply because it thought the argument inapplicable to *Klein*. The court said only that "the fact remains that Klein's salary was impermissibly reduced on occasion because of her suspensions which resulted from the quality or quantity of her work." *Id.* (Presumably the court believed that Klein's suspensions for rudeness, failure to help a patient and "performance problems" related to the quality of her work.)

It is possible that the court of appeals would find *Klein* inapplicable to disciplinary penalties imposed in connection with unauthorized absences for the reason relied on by the Court of Appeals for the Fourth Circuit in *Shockley v. City of Newport News*, 997 F.2d 18 (4th Cir.1993). In *Shockley*, the court held that 29 C.F.R. § 541.118 is not violated by imposing a partial-week deduction in pay as a penalty for a failure to report an absence, because such a deduction is inherent in the power to reduce pay for the partial-day reductions in pay now recognized as allowable under 29

C.F.R. § 541.5d. The holding is not entirely persuasive.[1] Section 541.5d addresses deductions in pay for certain partial-day absences, including unapproved absences. It is not clear that the regulation authorizes a deduction in pay imposed as a disciplinary sanction for taking unapproved leave or that it is intended to modify the language in § 541.118(a)(5) limiting permitted disciplinary deductions to those imposed for violations of major safety rules.

The conclusion seems inescapable that if the disciplinary deduction aspect of the salary basis test applies to government employees, there is no principled way in which to avoid its application to plaintiffs under Klein. I am persuaded, however, that just as the department has recognized through the promulgation of § 541.5d that Congress never intended that public employees would be covered by the prohibition on reductions in pay for partial-day absences, Congress never intended that state and local governments would be bound by the prohibition on disciplinary deductions of less than a week contained in 541.118(a)(5). Although the federal defendants maintain that there is a distinction between reductions for partial-day absences and disciplinary suspensions, they have provided no credible explanation for this position and it seems dubious in light of their arguments regarding the validity of § 541.5d.

As the Department of Labor explained when it promulgated § 541.5d, principles of public accountability would have made it impossible for many state and local governments to meet the salary basis test for managerial

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[1]The holding seems to reflect a growing recognition of the problems caused by attempting to apply to governmental employment the salary basis test developed for the private sector and an attempt to deal with those problems. *See also Avery v. City of Talladega*, 24 F.3d 1337 (11th Cir.1994) (holding that disciplinary suspension of two police lieutenants for non-safety-related infraction resulted in loss of exempt status for all lieutenants; adding that court would resist the temptation to conclude that § 541.118(a)(5) is arbitrary and capricious as applied to law enforcement employees, "because the City did not raise that issue in the district court and has not suggested it in this court").

employees if the test were not modified to permit the use of accrued leave systems that had been in place for decades. 57 Fed.Reg. 37667-76. The department recognized that requiring state and local governments to change their pay policies to conform to the § 541.118 salary basis test would conflict with the principles of public accountability to which many state and local governments are subject. 57 Fed.Reg. 37673. The department has acknowledged that the public "does not tolerate wasteful and abusive excesses such as padded payrolls or 'phantom' employees," *id.* at 37676, and that it was necessary to modify the salary basis test to accommodate these concerns in order to carry out Congress's intent that public employment would have the same professional, executive and administrative exemptions that private employment has always had.

Although promulgation of § 541.5d conformed the Department of Labor's regulations to congressional intent with respect to use of accrued leave, it did not resolve the question of the validity of applying to public employees the portions of § 541.118 that were not altered by the promulgation of § 541.5d. As I noted previously, had it been necessary to decide whether reductions in pay for partial-day absences violated the salary basis test prior to 1992, I would have held that the application of the pre-1991 regulation to the public sector did not accord with congressional intent and was invalid as applied to governmental employees. *See Chevron*, 467 U.S. at 843 and n. 9, 104 S.Ct. at 2781-82 and n. 9; *Stewart v. City and County of San Francisco*, 834 F.Supp. 1233, 1238 (N.D.Cal.1993) (if salary basis regulations in effect before 1991 were contrary to intent of Congress, regulations cannot be applied to public employees). *See also Martinez v. Rhode Island Housing and Mortgage Finance Corp.*, 738 F.2d 21, 26 (1st Cir.1984) (citing *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134, 56 S.Ct. 397, 400, 80 L.Ed. 528 (1936)) ("a rule out of harmony with the statute is a mere nullity").

Returning to § 541.118(a)(5), which prohibits the use of partial-week disciplinary suspensions except for violations of major safety rules, I find this provision invalid as applied to the public sector because it does not comport with

congressional intent to afford public sector employers the same opportunities for FLSA exemptions as private employers. The situation is more egregious than with partial-day absences, because the Department of Labor has not yet considered in any formal way the effects of § 541.118(a)(5) on state and local governments' ability to claim the FLSA exemption. Rather, subsection (5) of § 541.118(a) remains in force. It purports to tell state and local governments how they may discipline their employees and for what infractions, placing them in a quandary similar to the one they faced when they believed the choice was between dismantling accrued leave systems and forgoing all exemptions under the FLSA. Either the states give up their ability to discipline their employees in the way they believe best suited to maintaining public accountability or they forgo all exemptions under the FLSA.[2]

It is no answer to say, as the federal defendants do, that the impairment of the states' disciplinary authority is minor because government employers have other options for disciplining exempt employees, such as letters of reprimand, demotions, transfer to less favored positions or suspensions of more than a week. For many reasons, state and local governments lack the kind of disciplinary flexibility the federal defendants hypothesize. The inadequacy of the federal defendants' response is amplified by the fact that when the issue of disciplinary suspensions was raised during the notice and comment period for § 541.5d the department offered the same response it urges in this case, that is, that the disciplinary prohibition is no real burden on state and local governments in part because they have other disciplinary options, but then

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[2]Wholly apart from concerns of state autonomy, the salary basis test creates another Hobson's choice for state and local governments. These governments are required to keep precise records of all the time their employees work on federally-funded state projects and they are subjected to potential penalties if they fail to do so. At the same time the federal government seems to disallow these governments from claiming exempt status for professional employees if the employees are required to keep time records and are subject to discipline for not working or for falsifying their time records.

noted that § 541.118(5) was not open for comment during the present rulemaking. However, the Department expects to consider this issue as appropriate in proposed revisions of Part 541 at a later date. 57 Fed.Reg. 37674. The Department of Labor cannot contend with any consistency that the application of § 541.118's prohibition on disciplinary sanctions vindicates congressional intent. The department has failed to give any formal consideration to this issue and has recognized the need for such consideration in the future, while arguing that promulgation of § 541.5d was necessary because § 541.118 was "out of harmony" with congressional intent. 57 Fed.Reg. 37672. It is not credible for the Department of Labor to acknowledge that the regulation needs substantial revision in order to comply with Congress's wishes, and then to assert without investigation that the application of another subsection of the regulation conforms with congressional intent. When an agency offers inconsistent interpretations of a statute, that agency's interpretations are not entitled to deference. *Batanic v. I.N.S*, 12 F.3d 662, 666 (7th Cir.1993).

Because the Department of Labor has neither considered the issue of disciplinary sanctions nor offered any persuasive reason for its apparent belief that the ability to impose disciplinary sanctions is less central to state and local governments' public accountability obligations than the ability to impose reductions for partial-day absences, the application of § 541.118(a)(5) to the public sector is arbitrary and capricious. I conclude that § 541.118(a)(5) is invalid as applied to the public sector.

Construing § 541.118(a)(5) to be invalid as applied to the public sector vindicates two corollary principles of statutory construction that " 'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality,' " *Rust v. Sullivan*, 500 U.S. 173, 190, 111 S.Ct. 1759, 1771, 114 L.Ed.2d 233 (1991) (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988) and adding emphasis) and " 'a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubt on that score.' " *Rust*, 500 U.S. at 191, 111 S.Ct. at 1771

(quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401, 36 S.Ct. 658, 659, 60 L.Ed. 1061 (1916)). *See also Batanic*, 12 F.3d at 666. The state defendants contend persuasively that interfering with the states' ability to decide how to discipline employees who violate rules promoting public accountability would raise a serious constitutional issue.

The state defendants argue that if the FLSA is read as reflecting Congress's intent to apply the disciplinary suspension aspect of the salary basis test to state and local governments, to that extent, the statute is an unconstitutional violation of the guarantee clause because it undermines the public accountability of state governments, the bedrock upon which the states ground their governing authority. The clause provides in pertinent part: "The United States shall guarantee to every State in this Union a Republican Form of Government...." Many courts have held the clause nonjusticiable. *See, e.g., Risser v. Thompson*, 930 F.2d 549, 552 (7th Cir.) (rejecting a challenge to Wisconsin's partial-veto scheme as violative of the guarantee clause), *cert. denied*, — U.S. —, 112 S.Ct. 180, 116 L.Ed.2d 142 (1991). However, in two recent cases the Supreme Court has suggested that this long-held view of the nonjusticiability of the clause may be overstated, particularly when the claim under the clause does not present a political question (as was the case in *Risser*). *New York v. United States*, — U.S. —, —, 112 S.Ct. 2408, 2433, 120 L.Ed.2d 120 (1992) (citing among others, Merritt, 88 Colum.L.Rev. 70-78); *Gregory v. Ashcroft*, 501 U.S. 452, 462-63, 111 S.Ct. 2395, 2402, 115 L.Ed.2d 410 (1991). Prof. Merritt's thoughtful discussion of the guarantee clause supports the argument advanced by the state defendants that the clause is not the dead letter it is often assumed to be; rather, it supplies the substantive content the Tenth Amendment lacks by setting out in affirmative language the federal government's promise "to secure each of the states the autonomy necessary to maintain a republican form of government" and by providing "an essential constitutional limit on federal interference with state autonomy." 88 Colum.L.Rev. at 22-23. "The guarantee clause, therefore, promises each state a government based on popular control." *Id.* at 25. The state defendants' guarantee clause argument presents a genuine

constitutional question. It is not an argument foreclosed by the decision in *Garcia*, 469 U.S. 528, 105 S.Ct. 1005, because it was never raised in that case.

In *Rust*, 500 U.S. at 191, 111 S.Ct. at 1771, the Supreme Court recognized that it is legitimate not to reach constitutional questions that can be avoided through choices in statutory construction. The Court recognizes another principle of statutory construction that avoids unnecessary adjudication of the Tenth Amendment and guarantee clause issues: when congressional action upsets the usual constitutional balance of state and federal powers, " 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' " this balance. *Gregory v. Ashcroft*, 501 U.S. at 460, 111 S.Ct. at 2401 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985)). Because *Garcia* "left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, [the courts] must be absolutely certain that Congress intended such an exercise." *Id.* at 464, 111 S.Ct. at 2403. The state defendants maintain and the federal defendants agree that when Congress extended the FLSA to public employees, it was thinking primarily in terms of minimum wage requirements and never considered the effect a regulation such as the salary basis test would have on the already complex pay and leave systems of public employment. When it is clear, as the federal defendants concede, that Congress had no intention of requiring state and local governments to choose between the managerial exemption and their public accountability principles, it becomes inappropriate to interpret the FLSA to require application of the disciplinary provisions of the salary basis test. Doing so would be a distinct expansion of an already significant intrusion into state sovereignty, *Garcia*, 469 U.S. at 557-79, 105 S.Ct. at 1021-32 (Powell, J., dissenting) and at 580-89, 105 S.Ct. at 1033-37 (O'Connor, J., dissenting). Moreover, it is an unnecessary expansion.

Nothing in the salary basis test is essential to an effective extension of the FLSA to government workers. Indeed, the United States Office of Personnel Management

does not use either salary or the salary basis test to determine executive, administrative and professional exemptions under the FLSA for any federal employees other than congressional employees, employees of the United States Postal System, the Tennessee Valley Authority, the Postal Rate Commission and the Library of Congress. Instead, it makes the determination according to grade level and position classification. 57 Fed.Reg. 37667. It is important to keep in mind that the salary basis test is only a tool for implementing the FLSA, not a part of the substantive law of the FLSA itself. This fact makes it all the more unlikely that when Congress extended the FLSA in 1974, it did so with the intent to apply the existing salary basis test to state and local governmental workers. In the absence of any clear statement by Congress that it intended the salary basis test to be applied to state and local governments as part of the expansion of FLSA in 1974 or 1985, *Ashcroft* requires that such a choice not be assumed and that regulations requiring the application of such tests be invalidated.

E. *Retaliation by State Defendants*

Pinning down plaintiffs' theory of retaliation is not easy. Plaintiffs make a number of allegations in their briefs, ranging from references to statements made in private discussions by persons not party to this lawsuit to a theory that defendants

> retaliated against the Plaintiffs in violation of Section 215(A)(3) of the FLSA by creating a system of position classifications which establish exempt FLSA status as a precondition to qualifying for and retaining particular civil service classifications and, thereafter, using this system as a basis for threatening Plaintiffs with negative consequences in the form of downward reclassification if they prevail in this action.

Plaintiffs' reply brief, dkt. # 202, at 3. Despite numerous allegations in their briefs, plaintiffs proposed as facts only the substance of Judith Burke's affidavit and certain statements made by defendants' counsel during the course of this

litigation. Therefore, I will confine this discussion to the theory that is supported by factual proposals: that the affidavit and defendants' counsel's comments constituted an actionable threat of retaliation against plaintiffs for commencing this lawsuit.

Plaintiffs' theory does not withstand close scrutiny. A review of the Burke affidavit and the statements of defendants' counsel reveals that they are nothing more than a straightforward explanation of their authors' views of the adverse consequences that plaintiffs might suffer if they succeeded in proving to the court that they were misclassified for their present positions. At the time the statements were made, the operative complaint in this case contained plaintiffs' allegations that their job duties did not meet the prerequisites for exemption from the FLSA. Had plaintiffs continued to pursue this theory, they might have proven that at least some of them were performing jobs with duties that did not justify an exemption from the FLSA. Had this happened, it would have been necessary to re-evaluate the job classifications. Whenever a re-evaluation of a job is undertaken, the possibility exists that the job will have to be downgraded or its classification changed. Telling prospective plaintiffs about this possibility is hardly a threat; it is a statement of reality.

In her affidavit, Judith Burke explained that some jobs presently held by plaintiffs make exempt status a precondition to retaining a particular civil service classification and that if plaintiffs were to lose their exempt status as a result of this lawsuit, they might not be eligible to retain their jobs. In response to this affidavit, plaintiffs assert that when defendants set up these jobs and made exempt status a condition, they were implementing a scheme to provide for downward classification in the event employees were to vindicate their rights under the FLSA. In reminding plaintiffs of this possibility, plaintiffs assert, defendants were retaliating against plaintiffs for the filing of this lawsuit. Interesting though this particular challenge might be, plaintiffs waived their right to pursue it in return for defendants' agreement not to challenge the application of a three-year period of recovery.

In short, I can find no merit in plaintiffs' theory of retaliation. Defendants are entitled to summary judgment on this claim.

F. *Employees Legro, Peronto and Olson*

It is undisputed that the reductions in pay for Larry Legro and Thomas Peronto were either inadvertent or not true reductions. The treatment of these two employees was not part of a pattern of inadmissible reduction and it did not convert them to nonexempt employees.

As to Karen Olson, defendants concede they may have erred in conditioning her ability to work at home on her waiver of her rights under the FLSA. If so, that is a separate violation independent of the claims raised in this lawsuit. Olson's treatment does not implicate any rights of the other plaintiffs or support any of the issues in dispute in this suit.

ORDER

IT IS ORDERED that the motion for summary judgment of defendants Robert Reich and the United States Department of Labor is GRANTED; the plaintiffs' motion for partial summary judgment on liability is DENIED; and the state defendants' motion for summary judgment is GRANTED in all respects. The clerk of court is directed to enter judgment for defendants and close this case.

LIST OF PLAINTIFFS WHO CONSENTED TO JOIN ACTION

Mustafa Abdulghani, Khader Abual-Eis, Duane J. Acker, Christopher L. Adams, Steven Adamsky, Michael E. Adler, Thomas L. Ahrens, Abdulhamid M. Ali, Anthony P. Allard, Paul J. Ambrose, Robert James Anderson, Ron Anderson, David F. Andre, James A. Andreshak, Robert Arndorfer, Michael Dean Ash, Ricky L. Auseth, David L. Babler, Roy W. Bantley, David J. Barger, Rebecca A. Barile, George T. Barry, Larry J. Barta, David E. Barth, Kim Bartley, Henry J. Bassa, Donald A. Bay, Robert N. Beaudette, Duane E. Beckwith, Albert R. Belling, Robert L. Bennett, William J. Bennetts, James Joseph Benning, James E. Berg Jr., Donald W. Bergman, Candace B. Bettinger, John R. Bierman, James Billmeyer, Larry Dale Bisonette, Allan Bjorklund, Kenneth O. Bjorklund, Christian G. Blazek, Brian Bliesner, Michael A. Blodgett, Beth Blum, Jaime S. Boado, Robert J. Bocher, Roger A. Bohn, Leon B. Boland, John S. Bolka, Gary Bolstad, Lauren Bomkamp, Robert A. Braun, Paul A. Brehm, Roger N. Breitzmann, Sharon L. Bremser, Thomas Brennan, Brian S. Brock, Leonard C. Brody, Michelle Brokaw, Deborah A. Brucaya, Jerome G. Bruckert, Howard H. Brunmeier, Michael W. Bub, Paul G. Buckner, John H. Buran, Joseph W. Burggraf Jr., George F. Busch, James P. Buschkopf, David Buschkopf, Douglas A. Cain, Paul J. Caleb, Ronald L. Calkins, Vernon M. Carlson, William C. Carpenter, Paul A. Carr, David C. Castleberg, John W. Chapman, Robert J. Christie, Gary L. Colbert, Thomas J. Cole, Raymond T. Collins, John M. Collins, Terry D. Cook, John Martin Corbin, William J. Cronkrite, Albert P. Crowe, Eugene O. Dahl, Donald A. Dahle, David E. Dahlk, Stanley W. Dallman, Amy R. Damrow, William Dandeneau, Kenneth R. Dann, Charles R. Davenport, Kimberly S. DeCora, Darwin Derge, Thomas A. DeWinter, Francis J. Dierking, Brendan D. Dirkes, Andrew J. Dirks, Gaylord N. Dolphin, Norman Dombrowski, Francisco Rivera Dominguez, Dean F. Dopkins, Robert S. Downing, Gerald L. Drain, Kathleen J. Drews, LeRoy M. Dumonson, Alan Eckes, Ronald Egge, Norbert Elliott, Wafa A. Elqaq, Peter F. Engh, Bradley K. Erikson, Benedict Eruchalu, Richard D. Feeney, Peter K. Feneht, David L. Field, John W. Fincher, David Fischer, Philip E. Fish, John W. Fitzgerald,

Edward A. Fitzgerald, Patrick Fleming, Joseph L. Flottmeyer, Russell L. Frank, Richard O. Fries, Larry Funseth, Gregory F. Furlano, Gary A. Galliford, Ronald A. Garvens, Tom R. Gerstmann, Charles H. Geurts, James E. Gibeau, Janice M. Gibeau, Donald R. Gilbertson, Allen R. Gilbertson, Paul A. Gingras, Russell G. Glime, James F. Gloodt, Duane J. Golliher, Ronald J. Giuli, Robert Gose, Dalton G. Goss, C. Joseph Graf, Donald R. Grasser, Richard A. Grimsrud, Robert P. Grosch, Roberto Gutierrez, Don Haack, Russell Habeck, James A. Haefner, Robert Hanifl, Gustave E. Hanold, Alan G. Hansen, Ronald Harder, Robert A. Hardie, Thomas J. Hardinger, Colleen M. Harris, James C. Harris Jr., Wayne Hartling, Donald G. Hartman, Mohomad Hayek, Donald W. Heglund, Fergus N. Heintz, Lisa J. Herrmann, Thomas Heydel, Harland L. Higley, Darwin C. Hoefs, Walter J. Hoffman, Clifford R. Hoiby, Daniel A. Holloway, Clifford R. Hotchkiss, Elton R. Hubbard, Robert D. Hubing, Albert G. Hutter, Richard A. Huxford, Scott M. Ives, Thomas J. Jablonski, Dan Jashinsky, Stephanie R. Jaworski, Steven M. Jeidy, Norman A. Jensen, Judith A. Johnson, Ross T. Johnson, Bertil C. Johnson, Dewayne J. Johnson, Duane L. Johnson, Allan Johnson, Myles P. Johnson, Robert L. Johnson, Susan E. Johnson, Donald R. Johnston, Kerry C. Jones, Paul L. Jones, Robert J. Jones, Quentin L. Martin Jr., Jeffrey A. Kaarto, John A. Kaarto, Ronald P. Kapitanski, Charles A. Karow, James H. Kasdorf, Daniel H. Katzner, John G. Keiffer, Wilbert E. Kell, Todd Patrick Kennedy, Barbara J. Kerber, Thomas J. Kerr, David D. Kircher, Donald W. Kiefert, Allan J. Kimber, Keith J. King, Orville D. King, Mark A. Klipstein, Ralph C. Kloes, Kenneth D. Kluever, John J. Knapp, Ellsworth R. Koehnke, Lewis E. Kohn, James R. Koltz, Gary K. Krafcheck, Bernard E. Kranz, David T. Kringle, James R. Kropp, William P. Ksicinski, Robert T. Kubczak, Linus J. Kujak, David A. Lamont, Charles N. Landey, Glenn R. Landis, Merrill W. Landis, Robert O. Lang, Susan Langdon, Michael J. Larson, Lynda J. Lawler, Scott J. Lawry, Gilbert Layton, Larry J. Legro, Norbert A. Lehmann, Michael R. Leitzke, Michael Lenz, James A. Lepinski, William W. Leren, Carl G. Lesky, Paul H. Leu, Philip J. Liepitz, Randolp A. Lokken, Andrea T. Lobacz, Gary L. Lovelace, Dennis D. Loy, John E. Lucey, Ryan P. Luck, Randy W. Luedtke, Harold F.

Lutz, Kenneth C. Lyman, John Lynch, Dennis Lyngen, Timothy J. Maedke, Michael Malaney, Dale E. Marg, James R. Martin, John L. Martin, Arvid R. Martin, Richard A. Marz, Donald J. Matula, Andrew J. Maxwell, David C. Mayer, Merle T. McAuley, Timothy A. McCarthy, David D. McCosh, Joseph L. McKee, William R. McNary, Frederick S. Moeller, Ralph L. Meir, Jerald M. Mentzel, Robert S. Merila, James C. Merriman, Keith H. Meyer, Dale R. Merten, Jeffrey R. Michalski, Thomas E. Milchesky, Julie J. Millard, Robert W. Millard, Thomas H. Miller, Jack A. Miller, Larry G. Miller, William T. Miller, John Minor, Mark A. Mohlman, Sharam Mokhtari, Jon P. Molzahn, Matthew J. Morrell, Mark Morrison, Mohamed A. Mounir, Robert T. Mucha, Gerald R. Mueller, Patrick Muldoon, Michael D. Muller, Matthew D. Murphy, George T. Nelson, Richard P. Nelson, Randall S. Nevala, William R. Niemi, Clair J. Norris, Steven L. Nouzak, Vida Novakovich, Patrick F. O'Connor, Cindy M. O'Connor, William J. O'Mara Jr., Jay R. Obenberger, Jon Obenberger, John E. Oimoen, Daniel J. Ojibway, Sylvester F. Okon, Daniel Okpala, Olubunmi Olapo, Dale Oldenburg, Norbert Oleinik, Richard G. Olson, Karen L. Olson, Joseph S. Olson, LeRoy M. Olson, Gerald E. Olson, Charles Orville, Claudia Orvis, George Osipoff, Donald R. Ostreng, Ronald L. Ostreng, George E. Ott, David E. Owen, Saundra Parker, Raymond G. Parks, Dennis Parsley, Walter E. Parsons Jr., Biren A. Patel, Robert G. Pavlik, Ronald A. Paulson, Curtis R. Paulson, Sandra A. Pease, Roland E. Pentico, Daniel A. Penzkover, Michael J. Perkins, Thomas M. Peronto, Todd R. Peschke, Jeffrey A. Peters, Jean M. Peters, Lorie R. Peterson, James D. Peterson, Richard H. Pfeiffer, Timothy Patrick Phillips, Stacey L. Pierce, Donald D. Pike, James W. Pikulik, David P. Pilon, Jeffrey J. Plesko, John R. Pope, Robert L. Pozorski, Edward J. Prissel, Richard A. Prissel, Frank J. Pritzlaff, Arlyn L. Proksch, William H. Prue, Peter J. Prusak, Mike Rathsack, Katherine J. Redell, John L. Reed, Gene L. Reiter, Gene W. Renguette, Anne L. Reshadi-Nezhad, Brian V. Revello, James B. Rice, Harvey L. Rieder, James L. Riedl, Charles E. Riley, Edward M. Riley, Leland J. Ringblom, Donald M. Ritland, Richard O. Roberts, Michael Roberts, Roderick B. Robillard, Joseph W. Rocki, Doreen A. Rogers, James D. Rohe, Robert E. Roszkowski, David Russell, Glenn D. Saeger, Donald

E. Saeger, Lynn Saeger, Terry A. Salzman, Gary Sassman, James P. Savoldelli, Susan Saxe, John G. Schaefer, Garry W. Schaeffer, Albert L. Schasel, Richard H. Scheel, Bruce R. Schmidt, David Arthur Schmidt, Sheri Schmit, George Schneeberg, Elizabeth S. Schneider, Richard R. Schradek, Kristi M Sebastian, Kelly A. Seitter, Melvin Sensenbrenner, Darwin D. Sering, James H. Shea, Patrick J. Shuda, Dennis E. Siegrist, David Siewert, David M. Simon, Thomas A. Sislo, Jerry K. Smith, Philip E. Smith, Eugene A. Smith, Norman N. Snyder, Gary L. Snyder, Robert D. Sobek, LeRoy Henry Sommers, Terry L. Sossaman, Thomas J. Spalding, William J. Spencer, Robert E. Spoerl, Mark J. Sponem, Thomas A. Sprink, Henry W. Stair, Richard E. Stark, John R. Starry, Wayne C. Steffen, David C. Stein, William E. Stein, John J. Steiner, Gregory E. Stelmacher, James F. Stempa, Thomas M. Stemrich, Andrew J. Stensland, David L. Stertz, Thomas P. Stibbe, Robert K. Stockburger, Harvey D. Stodola, John R. Stoffel, Richard M. Story, Ronald J. Strak, Richard B. Strauss, Jerome L. Surber, Gerard M. Swim, Don Q. Syverson, Herbert Szatmary, Phillip M. Szweda, David B. Tamblyn, David Joseph Tapia, Robert Lee Taylor, Arlo W. Tesmer, Robert J. Theel, James F. Thompson, Galen Thompson, Kenneth Tlachac, James R. Tiedeman, Richard B. Toraason, Kimberly M. Tollers, Ellsworth O. Tranberg, Jill Treadway, Craig J. Treadway, Terry A. Treutel, Glen N. Trzebiatowski, Peter S. Trzinski, Gary E. Turk, Michael D. Vande Hei, Gregory A. Vander Velden, Anthony M. Vander Wielen, John H. Vesperman, Mark A. Vesperman, Norbert L. Vissers, Jeffrey Volz, Michael J. Vondrashek, Thomas G. Warnke, John M. Watzka, Robert A. Wazniak, Dale S. Weber, William E. Wegner, Michael Weidler, Paul K. Weidner, Conrad Weiffenbach, George A. Wende, James G. Wendels, Joseph V. White, Wayne E. Whitehead, Keith Wickersham, John B. Wickler, Michael G. Widen, Richard J. Wienfurt, Donald E. Williamson, Keith Alan Wilkinson, Michael G. Williams, Joe R. Wilson, Danny L. Winrich, Dennis Witt, Robert C. Wittlinger, Kurt Wranovsky, Jan M. Wyss, Tou X. Yang, John J. Yelich Jr., William F. Zakrzenski, Eugene Zapata, Wilbur J. Zemlicka, Melvin Zemlicka, Paul R. Zoellner, James L. Zwick and the State Engineering Association.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, of the United States Constitution provides, in relevant part:

> The Congress shall have power ...
> To regulate Commerce...among the several States,...

Article IV, Section 4, of the United States Constitution provides, in relevant part:

> The United States shall guarantee to every State in this Union a Republican Form of Government....

Article X of the Amendments to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article XIV, Section 1, of the Amendments to the United States Constitution provides, in relevant part:

> No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES STATUTES INVOLVED

5 U.S.C. Part 3, Ch. 75 (Adverse Actions) provides, in relevant part:

SUBCHAPTER I–SUSPENSIONS FOR 14 DAYS OR LESS

§ 7501. Definitions

For the purpose of this subchapter–

(1) "employee" means an individual in the competitive service [continuously employed for one year and who is not on probation].

(2) "suspension" means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.

§ 7502. Actions covered

This subchapter applies to a suspension for 14 days of less, but does not apply to a suspension [of an administrative law judge (5 U.S.C. § 7521), for national security reasons 5 U.S.C. § 7532, or initiated by Special Counsel investigation].

§ 7503. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an employee may be suspended for 14 days or less for such cause as will promote the efficiency of the service (including discourteous conduct to the public confirmed by an immediate supervisor's report of four such instances within any one-year period or any other pattern of discourteous conduct).

(b) [Entitling employe to advance notice, opportunity to be heard, representation and written decision articulating reasons.]

(c) [Maintenance or records.]

§ 7504. Regulations

[OPM may prescribe regulations.]

SUBCHAPTER II–...SUSPENSIONS FOR MORE THAN 14 DAYS...

§ 7511. Definitions; application

(a) For the purpose of this subchapter:

(1) "employee" means–

(A) an individual in the competitive service [continuously employed for one year and who is not on probation]; and

(B) a preference eligible in an Excepted Agency in the excepted service [and certain agencies continuously employed for one year];

(2) "suspension" has the meaning as set forth in section 7501(2) of this title.

....

§ 7512. Actions covered

This subchapter applies to–

....

(2) a suspension for more than 14 days [other than for national security reasons or initiated by Special Counsel investigation];

....

§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an [employee may be suspended for 14 days or less] for such cause as will promote the efficiency of the service.

(b) [Entitling employe to advance notice, opportunity to be heard, representation and written decision articulating reasons.]

(c) [Agency may allow hearing.]

(d) [Right to appeal.]

(e) [Maintenance of records.]

§ 7514. Regulations

[OPM may prescribe regulations.]

SUBCHAPTER III–
ADMINISTRATIVE LAW JUDGES

§ 7521. Actions against administrative law judges

(a) An action may be taken against an administrative law judge...only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

(b) The actions covered by this section are–

....

(2) a suspension [other than for national security reasons or initiated by Special Counsel investigation];

....

SUBCHAPTER IV–NATIONAL SECURITY

....

§ 7532. Suspension and removal

(a) Notwithstanding other statutes, the head of an agency may suspend without pay an employee of his agency when he considers that action necessary in the interests of national security. [Procedures for notification and response.]

(b) [Removal after suspension.]

(c) [Due process requirements.]

....

SUBCHAPTER V–SENIOR EXECUTIVE SERVICE

§ 7541. Definitions

(a) For the purpose of this subchapter:

(1) "employee" means a career appointee in the Senior Executive Service who [has completed probation and was covered by subchapter II immediately before appointment to the Senior Executive Service.]

(2) "suspension" has the meaning as set forth in section 7501(2) of this title.

§ 7542. Actions covered

This subchapter applies to a...suspension for more than 14 days [other than for national security reasons or initiated by Special Counsel investigation].

§ 7543. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an employee [may be suspended for 14 days or] only for such cause as will promote the efficiency of the service.

(b) [Entitling employe to advance notice, opportunity to be heard, representation and written decision articulating reasons.]

(c) [Agency may allow hearing.]
(d) [Right to appeal.]
(e) [Maintenance of records.]

5 U.S.C. Part 3, Ch. 75 (Adverse Actions) – enacted on September 6, 1966 and superceded with the current provisions in 1978 – provides, in relevant part:

SUBCHAPTER I–COMPETITIVE SERVICE

§ 7501. Cause; procedure; exception

(a) An individual in the competitive service may be...suspended without pay only for such cause as will promote the efficiency of the service.

(b) [Entitling employe to advance notice, opportunity to be heard, representation, written decision articulating reasons and maintenance of records.]

(c) [Allowing "preference eligibles" to elect coverage and excluding suspensions for national security reasons.]

SUBCHAPTER II–PREFERENCE ELIGIBLES

§ 7511. Definitions

For the purpose of this subchapter–

(1) [Definition of "preference eligible"]

(2) "adverse action" means a...suspension for more than 30 days,....

§ 7512. Cause; procedure; exception

(a) An agency may take adverse action against a preference eligible employee,...only for such cause as will promote the efficiency of the service.

(b) [Due process requirements.]

(c) [Does not apply to suspension for national security reasons.]

....

SUBCHAPTER IV-NATIONAL SECURITY

....

§ 7532. Suspension and removal

(a) Notwithstanding other statutes, the head of an agency may suspend without pay an employee of his agency when he considers that action necessary in the interests of national security. [Procedures for notification and response.]

(b) [Removal after suspension.]

(c) [Due process requirements.]

....

29 U.S.C. § 203, as amended in 1974, provides, in relevant part:

§ 203. Definitions

As used in this chapter–

(1) ...

(c) "State" means any State of the United States...

(d) "Employer"...includes a public agency....

(e) (1) ...

(2) In the case of an individual employed by a public agency, ["employe"] means–

...

(C) any individual employed by a State...other than such an individual–

(i) who is not subject to the civil service laws of the State...which employs him; and

(ii) who–

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level,

(IV) is an immediate advisor to such an officeholder with respect to the constitutional or legal powers of his office.

...

(x) "Public agency" means...the government of a State...[or] a State....

29 U.S.C. § 207(a)(1) provides, in relevant part:

(a)(1) ...[N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce...for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 213(a) provides, in relevant part:

(a) The provisions of section[]...207 of this title shall not apply with respect to–

(1) any employee employed in a bona fide executive, administrative, or professional capacity,...(as such terms are defined and delimited from time to time by regulations of the Secretary [of USDOL], subject to the provisions of [the Administrative Procedures Act, 5 U.S.C. §§ 551-559]...);...

UNITED STATES REGULATIONS INVOLVED

5 C.F.R. Part 551, Subpart B – promulgated by the Office of Personnel Management – provides:

SUBPART B–EXEMPTIONS

§ 551.201 Agency authority.

The employing agency shall exempt from the overtime provisions of the Act any employee who meets the exemption criteria of this subpart and such supplemental interpretations or instructions as shall be issued by the Office of Personnel Management.

§ 551.202 General principles governing exemptions.

In all exemption determinations, the agency shall observe the principles that-

(a) Exemption criteria shall be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.

(b) The burden of proof rests with the agency that asserts the exemption.

(c) All employees who clearly meet the criteria for exemption must be exempted.

§ 551.203 Exemption of General Schedule employees.

(a) Any employee properly classified at GS-4 or below (or the equivalent level in other white collar pay systems) shall be nonexempt;

(b) Any employee properly classified at GS-5 through GS-10 (or the equivalent level in other white collar pay systems) shall be exempt only if the employee is an executive, administrative, or professional employee as defined in §§ 551.204, 551.205, and 551.206 of this subpart.

§ 551.204 Executive exemption criteria.

An "executive" employee is a supervisor, foreman, or manager who manages a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function) and regularly and customarily directs the work of at least three subordinate employees (excluding support employees) and meets all the following criteria:

(a) The employee's primary duty consists of management or supervision. The primary duty requirement is met if the employee–

(1) Has authority to select or remove, and advance in pay and promote, or make any other status changes of subordinate employees, or has authority to suggest and recommend such actions with particular consideration given to these suggestions and recommendations; and

(2) Customarily and regularly exercise discretion and independent judgment in such

activities as work planning and organization; work assignment, direction, review, and evaluation; and other aspects of management of subordinates, including personnel administration.

(b) In addition to the primary duty criterion that applies to all employees, foreman level supervisors in the Federal Wage System (or the equivalent in other wage systems), employees at the GS-7 through GS-9 level subject to section 207(k) of Title 29, United States Code, and employees classified at the GS-5 or GS-6 level (or equivalent in other white collar pay systems) must spend 80 percent or more of the worktime in a representative workweek on supervisory and closely related work.

§ 551.205 Administrative exemption criteria.

An administrative employee is an advisor, assistant, or representative of management, or a specialist in a management or general business function or supporting service who meets all of the following criteria:

(a) The employee's primary duty consists of work that -

(1) Significantly affects the formulation or execution of management policies or programs; or

(2) Involves general management or business functions or supporting services of substantial importance to the organization serviced; or

(3) Involves substantial participation in the executive or administrative functions of a management official.

(b) The employee performs office or other predominantly nonmanual work which is-

(1) Intellectual and varied in nature; or

(2) Of a specialized or technical nature that requires considerable special training, experience, and knowledge.

(c) The employee must frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(d) In addition to the primary duty criterion that applies to all employees, General Schedule employees classified at GS-5 or GS-6 (or the equivalent in other white collar system) must spend 80 percent or more of the worktime in a representative workweek on administrative functions and work that is an essential part of those functions.

§ 551.206 Professional exemption criteria

A professional employee is an employee who meets all of the following criteria, or any teacher who is engaged in the imparting of knowledge or in the administration of an academic program in a school system or educational establishment.

(a) The employee's primary duty consists of -

(1) Work that requires knowledge in a field of science or learning customarily and characteristically acquired through education or training that meets the requirements for a bachelor's or higher degree, with major study in or pertinent to the specialized field as distinguished from general education; or is performing work, comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field; or

(2) Work in a recognized field of artistic endeavor that is original or creative in nature (as distinguished from work which can be produced by a person endowed with general manual or intellectual ability and training) and the result of

which depends of the invention, imagination, or talent of the employee.

(b) The employee's work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought process for satisfactory performance.

(c) The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(d) In addition to the primary duty criterion that applies to all employees, General Schedule employees classified at GS-5 or GS-6 (or the equivalent in other systems), must spend 80 percent or more of the worktime in a representative workweek in professional functions and work that is an essential part of those functions.

29 C.F.R. § 541.1 – promulgated by USDOL – provides, in relevant part:

§ 541.1 Executive.

The term "employee employed in a bona fide executive * * * capacity" in [29 U.S.C. § 213(a)(1)] shall mean any employee:

(a) Whose primary duty [is managing either the place he is employed or a subdivision of that place]; and

(b) [who directs the work of others]; and

(c) [who has hiring and firing authority]; and

(d) [who normally exercises discretion]; and

(e) [who does not devote more than set percentages of] his hours at work in the workweek to the performance of the work described in paragraphs (a) through (d) [unless

the employe works by themselves or has certain ownership interests]; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week . . . , exclusive of board, lodging, or other facilities: *Provided* [that an employe compensated on a salary basis at not less than $250 per week is presumed to meet certain of the above duties criteria].

29 U.S.C. § 541.2 provides, in relevant part:

§ 541.2 Administrative.

The term "employee employed in a bona fide *** administrative *** capacity" in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of either:

(1) [Performing] office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or

(2) [Performing functions in administering an educational facility]; and

(b) [Normally] exercises discretion and independent judgment; and

(c) (1) [Normally] assists a proprietor or [an executive or administrative employe], or

(2) [Under general supervision performs specialized or technical work], or

(3) [Under general supervision executes special assignments or tasks]; and

(d) [who does not devote more than set percentages of] his hours worked in the workweek...to the performance of the work described in paragraphs (a) through (c), of this section; and

(e) (1) Who is compensated for his services on a salary or fee basis at a rate of not

less than $155 per week...exclusive of board, lodging, or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) [or equal to entry level teachers]: *Provided* [that an employe compensated on a salary basis at not less than $250 per week is presumed to meet certain of the above duties criteria].

29 C.F.R. § 541.3 – promulgated by USDOL – provides, in relevant part:

§ 541.3 Professional.

The term employee *employed in a bona fide* * * * *professional* * * * *capacity* in [29 U.S.C. § 213(a)(1)] shall mean any employee:

(a) Whose primary duty consists of the performance of:

(1) Work requiring knowledge of an advance [sic] type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

(2) [Certain artistic work], or

(3) [Certain teaching or instructing work], or

(4) [Certain computer-related work]; and

(b) Whose work requires [discretion and judgment]; and

(c) Whose work is predominantly intellectual and varied in character [such that the results or output cannot be standardized to a given period of time]; and

(d) [who does not devote more than set percentages of] his hours worked in the

workweek to activities [other than as described in paragraphs (a) through (c)]; and

(e) Who is compensated for services on a salary or fee basis at a rate of not less than $170 per week...exclusive of board, lodging, or other facilities: *Provided*, [that an employe compensated on a salary or fee basis at not less than $250 per week is presumed to meet certain of the above duties criteria].

29 C.F.R. § 541.5d effective as of September 18, 1992 (57 Fed. Reg. 37666 and 37677) – promulgated by USDOL – provides:

§ 541.5d Special provisions applicable to employees of public agencies.

(a) An employee of a public agency who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under § 541.1, 541.2, or 541.3 on the basis that such employee is paid according to a system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because–

(1) permission for its use has not been sought or has been sought and denied;

(2) accrued leave has been exhausted; or

(3) the employee chooses to use leave without pay.

(b) Deductions from the pay of an employe of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid "on a salary basis" *except* in the workweek in which the furlough

occurs and for which the employe's pay is accordingly reduced.

29 C.F.R. § 541.5d, effective from September 6, 1991 (56 Fed. Reg. 45824) until superseded on September 18, 1992 (57 Fed. Reg. 37666) – promulgated by USDOL – provided:

> **§ 541.5d Special Provisions Applicable to Public Sector Employers (Federal, State and Local Governments)**
>
> (a) A Federal, State or local government employee ("Public employee") who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under §§ 541.1, 541.2, or 541.3 of this part on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or public policy under which the employee accrues personal leave and sick leave and, absent the use of such accrued leave (because the leave has been exhausted or by the employer's choice), requires the public employee's pay to be reduced ("leave without pay") for absences, for personal reasons or because of illness or injury, of less than one work-day.
>
> (b) Deductions from a public employee's pay that are not regular and recurring for absences due to a budget-required furlough shall not disqualify the employee from being paid "on a salary basis" except in the workweek in which such deductions occurred.

WISCONSIN STATUTES INVOLVED

Section 15.001, Wis. Stats., provides, in relevant part:

> **15.001 Declaration of policy.** (1) THREE BRANCHES OF GOVERNMENT. The "republican form of government" guaranteed by the U.S. constitution [at Art. IV, Sec. 4] contemplates the

separation of powers within state government among the legislative, the executive and the judicial branches of the government. [Defines the duties of the three branches and that they are to be kept separate.]

....

(2) GOALS OF EXECUTIVE BRANCH ORGANIZATION. (a) As the chief administrative officer of the state, the governor should be provided with the administrative facilities and the authority to carry out the functions of the governor's office efficiently and effectively within the policy limits established by the legislature.

....

(c) The organization of state government shall assure efficient and effective administration of the policies established by the legislature. It is the goal of reorganization to promote efficiency by improving the management and coordination of state services and by eliminating overlapping activities.

....

Section 16.415, Wis. Stats., provides, in relevant part:

16.415 Certification of payrolls. (1) [No] fiscal officer of this state may [allow the payment of] any compensation to any person in the classified service of the state unless an estimate, payroll or account for such compensation, containing the names of every person to be paid, bears the certificate of the appointing authority that...the pay for [each person named in the estimate, payroll or account] has been established in accordance with, the law, compensation plan or applicable collective bargaining agreement, and rules of the secretary of employment relations and the administrator of the division of merit

recruitment and selection in the department of employment relations then in effect.

. . .

(3) Any sums paid contrary to this section may be recovered from any appointing authority making such appointments in contravention of law or of the rules promulgated pursuant thereto, or from any appointing authority signing or countersigning or authorizing the signing or countersigning of any warrant for the payment of the same, or from the sureties on the official bond of any such appointing authority, in an action in the circuit court for any county within the state, maintained by the secretary of employment relations, or by a citizen resident therein, who is assessed for, and liable to pay, or within one year before the commencement of the action has paid, a state, city or county tax within this state. All moneys recovered in any action brought under this section when collected, shall be paid into the state treasury except that if a citizen taxpayer is plaintiff in any such action he or she shall be entitled to receive for personal use the taxable cost of such action and 5% of the amount recovered as attorney fees.

Section 16.53, Wis. Stats., provides, in relevant part:

16.53 Preaudit procedure. The department of administration shall preaudit claims in accordance with the following procedures:

. . .

(b) *Payrolls.* Payrolls, to be entitled to audit, shall be certified by the proper officers who shall set forth the nature of the services rendered by each person named therein.

. . .

Section 20.923, Wis. Stats., provides, in relevant part:

20.923 Statutory salaries. The purpose of this section is to establish a consistent and equitable salary setting mechanism for all elected officials, appointed state agency heads, division administrators and other executive-level unclassified positions. All such positions shall be subject to the same basic salary establishment, implementation, modification, administrative control and application procedures. The salary-setting mechanism contained in this section shall be directed to establishing salaries that are determined on a comprehensive systematic basis, bear equitable relationship to each other and to the salaries of classified service subordinates, and be reviewed and established with the same frequency as those of state employes in the classified service.

....

(16) OVERTIME EXCLUSION. The salary paid to any person whose position is included under subs. (2), (4), (4m), (5) and (8) to (12) is deemed to compensate that person for all work hours. No overtime compensation may be paid to any such person for hours worked in any workweek in excess of the standard basis of employment as specified in s. 230.35 (5) (a).

....

Section 111.90, Wis. Stats., provides, in relevant part:

111.90 Management rights. Nothing in this subchapter [governing collective bargaining agreements as to State employes] shall interfere with the right of the employer, in accordance with this subchapter to:

(1) Carry out the statutory mandate and goals assigned to the agency utilizing personnel, methods and means in the most appropriate and efficient manner possible.

(2) Manage the employes of the agency; hire, promote, transfer, assign or retain employes in positions within the agency; and in that regard establish reasonable work rules.

(3) Suspend, demote, discharge or take other appropriate disciplinary action against the employe for just cause;....

Section 111.91, Wis. Stats., provides, in relevant part:

111.91 Subjects of bargaining. . . .
(2) The employer is prohibited from bargaining on . . .
(c) Disciplinary actions . . . governed by s. 230.34 (1) (a), (am) and (ar), except as provided in those paragraphs.

Section 230.01, Wis. Stats., provides, in relevant part:

230.01 Statement of policy. (1) It is the purpose of this chapter to provide state agencies and institutions of higher education with competent personnel who will furnish state services to citizens as fairly, efficiently and effectively as possible.

(2) It is the policy of the state...to maintain a system of personnel management which fills positions in the classified service through methods which apply the merit principle, with adequate civil service safeguards. It is the policy of this state to...ensur[e] that all personnel actions...be based on the ability to perform the duties and responsibilities assigned to the particular position.... It is the policy of the state to ensure its employes opportunities for satisfying careers and fair treatment based on the value of each employe's services....

....

Section 230.34, Wis. Stats., provides, in relevant part:

230.34 ...[S]uspension...(1) (a) An employe with permanent status in class...may be...suspended without pay...only for just cause.

....

(b) No suspension without pay shall be effective for more than 30 days. The appointing authority shall, at the time of any action under this section, furnish to the employe in writing the reasons for the action.

(c) The secretary [of the department of employment relations] shall establish guidelines for uniform application of this authority among the various agencies.

....

Section 230.44, Stats., provides, in relevant part:

230.44 Appeal procedures. (1) APPEALABLE ACTIONS AND STEPS. . . . [T]he following are actions appealable to the [personnel] commission under s. 230.45 (1) (a):

. . .

(c) . . . [S]uspension . . . . If an employe has permanent status in class . . . , the employe may appeal a . . . suspension . . . to the commission, if the appeal alleges that the decision was not based on just cause.

NONREGULATORY AGENCY INTERPRETATIONS INVOLVED

29 C.F.R. § 541.118 – issued by USDOL – provides, in relevant part:

> **§ 541.118 Salary basis.**
>
> (a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.
>
> (1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.
>
> (2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy or practice provides compensation for such absences, deductions for absences of a day or longer because of sickness or disability may be made before an employee has qualified under such plan, policy or practice, and after he has exhausted his leave allowance thereunder. It is not required that the employee be paid any portion of his salary for such day or days for which he receives compensation for leave under such plan, policy or practice. Similarly, if the employer operates under a State sickness and disability insurance law, or a private sickness and disability insurance plan, deductions may be made for absences of a working day or longer if benefits are provided in accordance with the particular law or plan. In the case of an industrial accident, the "salary basis' requirement will be met if the employee is compensated for loss of salary in accordance with the applicable compensation law or the plan adopted by the employer, provided the employer also has some plan, policy or practice of providing compensation for sickness and disability other than that relating to industrial accidents.

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made where there is no work available, it indicates there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

(b) *Minimum guarantees plus extras.* It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $155 or more a week and, in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations.

Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employe performs any work. Such arrangements are subject to the exceptions in paragraph (a) of this section. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis". For example, a salary of $250 in each week in which any work is performed, and an additional $50 which is made subject to deductions which are not permitted under paragraph (a) of this section.

(c) *Initial and terminal weeks.* Failure to pay the full salary in the initial or terminal week of employment is not considered inconsistent with the salary basis of payment. In such weeks the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement. However, this should not be construed to mean that an employee is on a salary basis within the meaning of the regulations if he is employed occasionally for a few days and is paid a proportionate part of the weekly salary when so employed. Moreover, even payment of the full weekly salary under such circumstances would not meet the requirement, since casual or occasional employment for a few days at a time is inconsistent with employment on a salary basis within the meaning of the regulations.

29 C.F.R. § 541.314 – issued by USDOL – provides, in relevant part:

§ 541.314 Exception for physicians, lawyers, and teachers.

(a) A holder of a valid license or certificate permitting the practice of law or medicine or any of their branches, who is actually engaged in practicing the profession, or a holder of the requisite academic degree from the general practice of medicine who is engaged in an internship or resident program pursuant to the practice of his profession, or an employee employed and engaged as a teacher in the activity of imparting knowledge, is excepted from the salary or fee requirement. This exception applies only to the traditional professions of law, medicine, and teaching and not to employees in related professions which merely serve these professions.

(b) In the case of medicine:

[those excepted are defined.]

(c) In the case of medical occupations, the exception from the salary or fee requirement does not apply to pharmacists, nurses, therapists, technologists, sanitarians, dieticians, social workers, psychologists, psychometrists, or other professions which service the medical profession.

FEDERAL REGISTER PUBLICATIONS INVOLVED

3 Fed. Reg. 2518 (October 20, 1938) – published by USDOL as to 29 C.F.R. Part 541 – states, in relevant part:

> The following regulations–Part 541–(Regulations defining and delimiting the terms "any employee employed in a bona fide executive, administrative, professional,...capacity,...pursuant to [29 U.S.C. § 213(a)(1)]) are hereby issued....
>
> ....

> SECTION 541.1 *Executives and Administrative.* The term "employee employed in a bona fide executive [and] administrative...capacity" in [29 U.S.C. § 213(a)(1)] shall mean any employe [performing duties within defined scope of regulation] and who is compensated for his services at not less than $30 (exclusive of board, lodging, or other facilities) for a workweek.
>
> SECTION 541.2 *Professionals.* The term "employee employed in a bona fide...professional...capacity" in [29 U.S.C. § 213(a)(1)] shall mean any employe [performing duties within defined scope of regulation which make no mention of any compensation requirement].
>
> ...
>
> SECTION 541.5 *Petition for Amendment of Regulations.* ....In determining such future regulations, separate treatment for different industries and for different classes of employes will be given consideration.

5 Fed. Reg. 4077-4078 (October 15, 1940) – published by USDOL as to 29 C.F.R. Part 541 – states, in relevant part:

> ....These regulations repeal and supercede all regulations previously issued defining and delimiting the terms "any employees employed in a bona fide executive, administrative, professional...capacity..." and shall become effective October 24, 1940, and shall continue in force and effect until hereafter modified.
>
> ....
>
> SECTION 541.1 *Executives and Administrative.* The term "employee employed in a bona fide executive [and] administrative...capacity" in [29 U.S.C. § 213(a)(1)] shall mean any employe

[performing duties within defined scope of regulation] and

(e) who is compensated for his services on a salary basis at not less than $30 per week (exclusive of board, lodging, or other facilities),...

...

SECTION 541.3 *Professional.* The term "employee employed in a bona fide * * * professional * * * capacity" in [29 U.S.C. § 213(a)(1)] shall mean any employe who is–

[performing duties within defined scope of regulation], and

(b) compensated for his services on a salary or fee basis at a rate of not less than $200 per month (exclusive of board, lodging, or other facilities); *Provided* That this subsection (b) shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof.

...

SECTION 541.6 *Petition for Amendment of Regulations.* ....In determining such future regulations, separate treatment for different industries and for different classes of employes may be given consideration.

19 Fed. Reg. 1321-1322 (March 9, 1954) – published by USDOL as to 29 C.F.R. § 541.118 – states, in relevant part:

COMPENSATION "ON A SALARY BASIS"

Notice is hereby given that [USDOL] proposes to amend § 541.118 of Part 541, Subpart B (29 C.F.R. Part 541), as follows:

...

(5) ... Penalties imposed in good faith for infractions of safety rules, or for other major disciplinary reasons, will not affect the employee's salaried status.

...

Prior to the final adoption of the proposed amendment set forth above, consideration will be given to any views, arguments or data pertaining thereto [submitted to USDOL] within 30 days [of publication].

19 Fed. Reg. 4405-4406 (July 17, 1954) – published by USDOL as to 29 C.F.R. § 541.118 – states, in relevant part:

COMPENSATION "ON A SALARY BASIS"

....

The comments [received in response to the March 9, 1954 notice] have been carefully considered. On the basis of the comments, the provision that penalties may be imposed for major disciplinary reasons has been deleted, and the provision regarding penalties for infractions of safety rules has been clarified. The modified language will be found in § 541.118(a)(5). In all other respects, the amendment is adopted as proposed.

...

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant or other employes, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

33 Fed. Reg. 12491 to 12494 (September 4, 1966) – published by the Civil Service Commission as to 5 C.F.R. Part 752 (Adverse Actions by Agencies) – state, in relevant part:

Subpart A–General Provisions

§ 752.101 Applicability

This part applies to...suspensions...of employees of the Government of the United States....

...

§ 752.104 General standards

(a) An agency may not take an adverse action against an employee covered by this part except for such cause as will promote the efficiency of the service....

....

Subpart B–...Suspensions for More Than 30 days,...

§ 752.201 Coverage.

(a) *Employees covered.* [All employees in competitive service who have continually served for one year and are not on probation.]

(b) *Adverse actions covered.* This subpart applies [to suspensions for more than 30 days with certain exceptions.]

§ 752.202 Procedures

[Sets forth procedure for advance notice, opportunity to respond and notice of suspension decision.]

§ 752.203 Appeal rights to the Commission.

[Right to appeal to Commission.]

Subpart C–Suspensions of 30 Days or Less

§ 752.301 Coverage

(a) *Employees covered.* [All employees in competitive service who have continually served for one year and are not on probation.]

(b) *Adverse actions covered.* This subpart applies to suspensions of 30 days or less [with certain exceptions].

...

§ 752.302 Procedures

[Sets forth procedure for advance notice, opportunity to respond and notice of suspension decision.]

§ 752.303 Emergency procedures

[Allows agency to respond rapidly to need to avoid] damage to Government property or [circumstances] detrimental to the interests of the Government or injurious to the employee, his fellow workers, or the general public....

§752.304 Appeal rights to the Commission.

[Provides employees suspended for less than 30 days limited rights to appeal to the Commission.]

38 Fed. Reg. 11390 and 11392 (May 7, 1973) – published by USDOL as to 29 C.F.R. Part 541 – state, in relevant part:

The revised 29 CFR part 541 reads as follows:

....

Subpart A–General Regulations

....

§ 541.6 Petition for amendment of regulations.

Any person wishing a revision of any of the terms of the foregoing regulations may submit in writing to the Administrator a petition....In determining such future regulations, separate treatment for different industries and for different classes of employees may be given consideration.

Subpart B–Interpretations

§ 541.99 Introductory statement.

(a) [29 U.S.C. § 213(a)(1)] exempts from the wage and hour provisions of the act "any employee employed in a bona fide executive, administrative, or professional capacity...(as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act,... The [re]quirements of the exemption under this section of the act are contained in subpart A of this part.

....

§ 541.118 Salary basis.

....

39 Fed. Reg. 33255 (September 16, 1974) – published by the Civil Service Commission pursuant to 29 U.S.C. §§ 204(f) and 213(a)(1) as amended in 1974 – states, in relevant part:

> DEFINITION OF "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY"
>
> **Notice of Hearing**
>
> Pursuant to [29 U.S.C. §§ 204(f) and 213(a)(1)] notice is hereby given of a public hearing to be held [by the Commission].
>
> The purpose of the hearing is to obtain information, suggestions, or proposals in regard to proposed rulemaking to define the term "any employee employed in a bona fide executive, administrative, or professional capacity" for application to those employees of the U.S. Government for whom the U.S. Civil Service Commission administers the Fair Labor Standards Act. The specific issues to be explored include reasonable alternatives to the criteria established by the Secretary of Labor (including the use of salary tests, and the percentage of time limitations on nonexempt work), and recommendations for modification or expansion of the interim instructions issued by the Commission on the application of the exemption for executive, administrative, and professional employees.
>
> Although the regulation to be developed by the [Commission] will "apply to employees of the U.S. Government only, the hearing is open to the public and presentations will be accepted from other parties interested in the compatibility with regulations of the Secretary

of Labor which apply to State and local governments and other employees.

. . .

40 Fed. Reg. 27640 to 27641 – published by the Civil Service Commission to create 5 C.F.R. Part 551 (Pay Administration Under the Fair Labor Standards Act) effective July 1, 1975 – stated:

PART 551 – PAY ADMINISTRATION UNDER THE FAIR LABOR STANDARDS ACT

Exemptions

A new Part 551 is being added to Chapter I of 5 CFR, under [29 U.S.C. § 204(f)] as amended by Pub. L. 93-259 enacted April 3, 1974, which states:

> Notwithstanding any other provision of this Act, or any other law, the Civil Service Commission is authorized to administer the provisions of this Act with respect to any individual employed by the United States (other than any individual employed by the United States Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority).

Partial regulations governing exemptions are issued at this time, with regulations on other aspects to follow.

These regulations are issued without prior publication in proposed form. Because this is a matter relating to agency management and personnel practices, the provisions of the Administrative Procedure Act (now codified in 5 U.S.C. 553) concerning notice of proposed rule-making, opportunity for public participation, and delay in effective date are inapplicable.

The Civil Service Commission has, however, provided opportunity for all interested parties, including Federal agencies and employee organizations, and the public to comment on the issues covered by the exemption regulations. This opportunity was provided through circulation, in July 1974, to Federal agencies and unions representing Federal employees, of a draft proposing expansion of the interim instruction on exemption criteria with a request for comment, and through a formal public hearing notice of which was published on September 16, 1974 in the Federal Register (39 FR 33255).

The comments received reflected widely divergent views concerning the exemption criteria. The Commission has resolved the issues raised in terms of the policy of integrating exemption criteria with Federal classification systems to the extent possible, while maintaining results consistent with the exemption criteria applied by the Department of Labor.

In accordance with the foregoing, Chapter I of Title 5 of the Code of Federal Regulations is amended by adding a new Part 551, reading as follows:

....

Subpart B - Exemptions

....

§551.202 General principles governing exemptions.

In all exemption determinations, the agency shall observe the principles that:

(a) Exemption criteria shall be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.

(b) The burden of proof rests with the agency that asserts the exemption.

(c) All employees who clearly meet the criteria for exemption must be so exempted.

§ 551.203 Exemption of executive, administrative, and professional employee.

The employing agency shall exempt any employee who is an executive, administrative, or professional employee as defined herein.

(a) An executive employee is a supervisor, foreman, or manager who supervises at least three subordinate employees and who meets all of the following criteria:

(1) The employee's primary duty consists of management or supervision.

(2) The workers supervised constitute a recognized organizational unit.

(3) The employee regularly exercises discretion and independent judgment, under only general supervision, in planning, directing and controlling the work of the unit supervised.

(4) The employee performs significant personnel management duties.

(5) The employee's position is classified no lower than General Schedule Grade 5 (GS-5) or the equivalent level in other white collar pay systems, or the employee fully meets or exceeds the "Foreman range of responsibility" defined in the job grading standard for Wage Supervisors, if under the Federal Wage System or equivalent prevailing rate systems.

(6) In addition to the primary duty criterion that applies to all employees, Foreman level supervisors in the Federal Wage System or the equivalent in other wage systems, and employees classified below GS-10 or the equivalent in other white collar pay systems, must spend 80 percent or more of the worktime in a representative workweek on supervisory and closely related work.

(b) An administrative employee is an advisor, assistant or representative of management, or a specialist in a management or

general business function or supporting service who meets all of the following criteria:

(1) The employee's primary duty consists of work that:

(i) Significantly affects the formulation or execution or management policies or programs; or

(ii) Involves general management or business functions or supporting services of substantial importance to the organization serviced; or

(iii) Involves substantial participation in the executive or administrative functions of a management official.

(2) The employee performs office of other predominantly nonmanual work which is:

(i) Intellectual and varied in nature, or

(ii) Of a specialized or technical nature that requires considerable special training, experience and knowledge.

(3) The employee must frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(4) The employee's position is classified no lower than GS-7 or the equivalent level in other white collar pay systems.

(5) In addition to the primary duty criterion that applies to all employees, General Schedule employees below GS-10, or the equivalent in other salary systems, must spend 80 percent or more of the worktime in a representative work week on administrative functions and work that is an essential part of those functions.

(c) A professional employee is an employee who is practicing a learned or artistic profession and who meets all of the following criteria, or any teacher who is engaged in the imparting of knowledge or in the administration

of an academic program in a school system or educational establishment.

(1) The employee's primary duty consists of:

(i) Work that requires knowledge in a field of science or learning customarily and characteristically acquired through education or training that meets the requirements for a bachelor's or higher degree, with major study in or pertinent to the specialized field as distinguished from general education; or is performing work, comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field; or

(ii) Work in a recognized field of artistic endeavor that is original or creative in nature (as distinguished from work which can be produced by a person endowed with general manual or intellectual ability and training) and the result of which depends on the invention, imagination, or talent of the employee.

(2) The employee's work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought process for satisfactory performance.

(3) The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(4) The employee's position is classified no lower that GS-7 or the equivalent level in other white collar pay systems.

(5) In addition to the primary duty criterion that applies to all employees, General Schedule employees below GS-10, or the

equivalent in other salary systems, must spend 80 percent or more of the worktime in a representative workweek on professional functions and work that is an essential part of those functions.

§ 551.204 Exemption of employees serving in foreign areas.

[Exempting employes working outside United States and its territories.]

Effective date: July 1, 1975.

44 Fed. Reg. 3440, 3444-3445 (January 16, 1979) – published by the Office of Personnel Management to implement the Civil Service Act of 1978 – states, in relevant part:

PART 752–ADVERSE ACTIONS

...

...[I]n order to provide continuity of operations and to give immediate and timely effect to the appropriate provisions of the Civil Service Reform Act of 1978...the Office of Personnel Management is revising 5 CFR Part 752 as set forth below:

...

48 Fed. Reg. 49494 (October 25, 1983) – published by the Office of Personnel Management as to 5 C.F.R. Part 551 – states, in relevant part:

OPM's Role as Administrator of the FLSA in the Public Sector

We believe that most of the comments opposing the proposed rules reflect a general misunderstanding of OPM's role as Administrator of the FLSA for the Federal sector. On the one hand, OPM is charged with the responsibility to administer the FLSA "in such a manner as to assure consistency with the meaning, scope, and application established by the rulings, regulations, interpretations, and

> opinions of the Secretary of Labor which are applicable in other sectors of the economy." (H.Rept. 93-913, March 15, 1974, p.28) On the other hand, the Congress realized that, when applied to the Federal sector, the FLSA would cause conflicts with existing, valid Federal pay and classification statutes (chiefly contained in title 5, United States Code). It was this recognition that led to the express grant of authority to [the Civil Service Commission] [now OPM] of "the authority to determine who in the Federal work force is covered." (120 Cong. Rec. 7335.)
>
> The legislative history [of the 1974 FLSA Amendments] recognizes that a literal adherence to [USDOL] regulations is not possible in the face of Federal personnel statutes, and that it is OPM's responsibility to reconcile these conflicts to the maximum extent practicable, while preserving the basic purpose of the FLSA.
>
> ....
>
> ....If OPM were to literally interpret its responsibility to be consistent with DOL it would apply a pure salary test, tied directly to the DOL figures....However, OPM is concerned not only with its mandate for consistency, but also with its concurrent responsibility to integrate the administration of the FLSA into the Federal pay and position classification process....[W]e have repeatedly emphasized [that] the position classification system is a *job evaluation* process which is a more logical system for defining exemption for Federal employees than gross weekly salary.

50 Fed. Reg. 47696-47997 (November 19, 1985) – published by USDOL as to 29 C.F.R. Part 541 – states, in relevant part:

> **SUMMARY:** The Wage and Hour Division is considering proposing revisions [to 29 C.F.R.

> Part 541]....Comments are invited concerning the current definitions of terms relating to the salary, duties, and responsibilities tests for [exempt] employees, as well as the interpretations of such definitions.
>
> ...
>
> Accordingly, comments are sought from interested parties concerning the matters set forth below, as well as any other issues of interest under this regulation.
>
> **I. Salary Tests.**
>
> ....Comments are sought with respect to the following matters related to the salary tests:
>
> ....
>
> 2. Should the salary tests be eliminated? If so, what tests should [USDOL] rely on to determine applicability of the 29 U.S.C. § 213(a)(1)] exemption? What would be the economic impact of the elimination of the salary tests?
>
> ....
>
> 10. Should [USDOL] recognize individual State and local government civil service systems for classifying [executive, professional and administrative] employees in applying the exemption to employees of such governments? Such recognition would not alter the traditional FLSA principle that an employer who claims an exemption under the Act has the burden of showing that it applies.

51 Fed. Reg. 2525 (January 17, 1986) – published by USDOL as to 29 C.F.R. Part 541 – states, in relevant part:

> This document extends the period for filing comments [on the issues noted in the Federal Register for November 17, 1985 from January 21, 1986 to] March 22, 1986.
>
> ....

....The agency believes that an extension of the comment period is appropriate because a number of interested parties have requested such an extension in order to permit them to complete a full examination of the advance notice of proposed rulemaking and provide comprehensive comments.

51 Fed. Reg. 7425 (March 4, 1986) – published by the Office of Personnel Management as to 5 C.F.R. Part 551 – states, in relevant part:

....A direct application of [USDOL] regulations to Federal employees is not feasible because DOL regulations do not take into account existing, sometimes conflicting, pay and classification statutes.

...[A union] recommended a cut-off salary... for determining presumed exemption....[A]s we repeatedly have emphasized, the position classification system is a *job evaluation* process which is more logical system for defining exemption for Federal employees than gross weekly salary.

52 Fed. Reg. 2102, 2109, 2023 (January 16, 1987) – published by USDOL as to 29 CFR Part 553 (Application of the Fair Labor Standards Act to Employees of State and Local Governments) – states, in relevant part:

[Commentators] requested various forms of special treatment for State and local governments with respect to the section 13(a)(1) exemption for bona fide executive, administrative, and professional employees, particularly with respect to the requirement in 29 CFR Part 541 that such employees be paid on a salary basis....

On November 19, 1985, [USDOL] published in the Federal Register (50 FR 47696)

an advance notice of proposed rulemaking requesting the views of the public on any changes they felt were necessary in 29 CFR Part 541. The comment period ended March 22, 1986. However, [USDOL] expects to publish a notice of proposed rulemaking concerning Part 541 during 1987. Interested parties will have the opportunity to offer comments on the subject matter of that regulation at that time.

In light of the separate rulemaking process with respect to Part 541, it would not be appropriate for [USDOL] to address this issue in developing a final rule for Part 553.

56 Fed. Reg. 45824 (September 6, 1991) – published by USDOL as to 29 C.F.R. Part 541 – with footnotes omitted except where noted, states, in relevant part:

SUMMARY: .... The purpose of this revision is to provide an exception from certain provisions requiring payment "on a salary basis" applicable only to public sector employees.
DATES: Effective Date: The interim final rule is effective on September 6, 1991.

....

I. Background

Since...1938, Congress and the Supreme Court have each periodically acknowledged the special circumstances of, and the different treatment to be accorded to, governmental employers and employees under the FLSA, as distinguished from employment in the private sector.

The regulations governing exemption...require [exempt employees to meet standards as to] both their duties and their compensation.... These regulations were adopted prior to the extension of FLSA coverage to public employees and, therefore, make no

distinction between public and private employment.

In administering the FLSA in the public sector, the Department has become aware that few public employers compensate employees in a manner that meets the "on a salary basis" requirement for exemption under the current regulation. Governmental payroll systems commonly prohibit paying employees for time not actually worked. Systems of leave in the public sector (as often is the case in the private sector) are generally relied on as the exclusive method to permit employees who might otherwise not be compensated for periods of absence to avoid reduction of compensation in connection with such absences.

The Department initially attempted to address this problem by means of an enforcement policy, adopted by the Wage and Hour Division on January 9, 1987. The policy, which is still in effect, provides that the Division, will not deny exemption...to an otherwise exempt executive, administrative, or professional employee in the public sector whose pay is reduced by deductions for absence(s) of less than a day for personal reasons, or because of illness or accident, because the employee does not have, or has exhausted available paid leave for such absence(s). This policy applies only where applicable State or local law, in effect before April 15, 1986, prohibits payment to employees for such absences which are not covered by paid leave.

[This] 1987 enforcement policy does not affect the rights of public employees to file private lawsuits under section 16(b) of the FLSA. Since...Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), there have been numerous lawsuits by public employees to recover overtime pay. The

courts...have approached the construction of the regulations in different fashions, and have reached differing results.

Some...found the exemption to be inapplicable for the sole reason that the public entity's pay practices did not meet the "on a salary basis" requirement. Construing the existing regulations, some courts have held that employees under a pay system which requires that deductions be made when the employee is absent and has no leave are not paid "on a salary basis" even where no such deductions have occurred. In these circumstances the "salary basis" requirement is not met because the employee's compensation was subject to deductions for absences of less than one day when all accumulated leave was exhausted. [Citations omitted.]

On the other hand, some courts have considered that even in the above-described circumstances a salary was not subject to deduction where there was no evidence that the employee's pay was ever reduced, that only actual and not "theoretical" deductions could invalidate the salary basis of compensation, and that rare instances of docking pay for absences of less than a day did not defeat the exemption (except in a workweek in which deduction was made). [Citations omitted.] Some courts have also allowed application of the "correction" provisions at 29 CFR 541.118(a)(6) to preserve exempt status in cases where the public employer made "inadvertent" deductions from pay for absences of less than a day when leave was exhausted, reimbursed the affected employee for such deductions, and promised future compliance. [Citations omitted.]

The Department has been considering (and continues to consider) a variety of possible changes to the regulations governing the

exemption...including the particular requirement in the public sector that such employees be paid on a salary basis.

In the meantime, these diverging judicial interpretations and accompanying confusion have developed, resulting in the exposure of governmental employers to potentially enormous and generally unexpected back wage liabilities to employees, some of whom would clearly be exempt if duties and amount of compensation alone were examined. Such unforeseen liabilities could seriously threaten the fiscal integrity of State and local governmental agencies, and could seriously disrupt widespread pay practices that were designed and intended to serve the public trust and were established long before State and local government employees were subject to the Fair Labor Standards Act.

State and local government jurisdictions have varied pay policies. Some of these pay policies are based on constitutional or statutory provisions while others are derived from regulations or policies that have evolved over the years. These pay systems are generally premised on the concept–based on principles of public accountability–that governmental employees should not be paid for time not worked, and that there is a need to be accountable to the taxpayers for the expenditure of public funds.

For these reasons the Department is of the view that public sector pay systems must be analyzed differently from, because they are significantly distinguishable from, private sector pay systems. In the Department's judgment, certain aspects of the existing "salary basis" regulatory requirement for exemption are unduly restrictive when applied in the public sector. These aspects are not, in the Department's judgment, valid indicators in the public sector of the bona fides of a claimed

exemption under section 13(a)(1). State and local governments are thus inappropriately deprived of the opportunity to apply the section 13(a)(1) exemption to their employees who would otherwise be properly exempt.

While the Department is continuing its overall review of the full range of issues raised by the public comments submitted on its advance notice of proposed rulemaking of November 19, 1985 (50 FR 47696), it is undertaking this separate rulemaking on the specific issue of application of the "salary basis" of payment for public sector employees. As discussed below, it is considered necessary to issue an interim final rule so as to stem any accrual of additional liability to State and local governments while consideration is given to the comments received on the rule.

....

III. Summary of the Rule.

A new § 541.5d is being added that provides that an otherwise exempt public sector employee who is paid according to a pay system that requires the use of paid leave and, absent the use of paid leave, reduces the employee's pay for absences of less than one work-day, will not be disqualified from exemption due to such pay system. This rule also provides that the exemption will not be defeated by deductions from salary caused by budget-required furloughs, which are not regular and recurring, except in the workweek in which such a deduction occurs.

...

Publication as an Interim Final Rule

Application of the salary basis test to State and local government employees may result in denial of the exemption to thousands of such employees who have been considered exempt by their employers. The Department considers it inappropriate that public sector employees be

denied the exemption because they fail to meet the "on a salary basis" test under pay systems imposed by law, regulation or public policy that were established pursuant to principles of public accountability even before extension of the Act to such employees. Such application could well result in enormous, unforeseen liability of such governments and may threaten their fiscal integrity. For these reasons it has been determined that an interim final rule is appropriate to forestall accrual of additional liability while the Department receives and considers comments in the preparation of any final rule which would be determined to be appropriate. Accordingly, the Secretary finds, pursuant to 5 U.S.C. 553(b)(3)(B), that prior notice and public comment are contrary to the public interest.

For the same reasons, the Secretary also for good cause finds, pursuant to 5 U.S.C. 553(d)(3), that this rule cannot be published 30 days before its effective date.

57 Fed. Reg. 37666 (August 19, 1992) – published by USDOL -- with footnotes omitted except where noted, states, in relevant part:

SUMMARY: This document provides revised final Regulations, 29 CFR part 541, governing the criteria for exemption from the minimum wage and overtime compensation requirements of the Fair Labor Standards Act ("FLSA" or "Act") for public sector employees employed in bona fide executive, administrative, and professional capacities. A special, limited exception from the exemption's requirement for payment "on a salary basis" is provided for certain public sector pay systems that reduce the pay of otherwise-exempt employees for partial-day absences when paid leave is not used

to cover such absences, and for deductions due to budget-required furloughs.

EFFECTIVE DATE: September 18, 1992.

....

II. Background

A. Summary of Statutory and Regulatory Provisions

...

The salary requirement has been an integral part of the 541 regulations since 1940. The existing regulatory interpretation of "salary basis" dates back to 1954 (19 FR 4405; July 17, 1954). These provisions were developed from extensive hearings and record evidence showing that executive, administrative, and professional employees employed in industries then-subject to the FLSA, which excluded governmental employers, were nearly universally paid on a salary basis. Employers not compensating on a salary basis have had ample opportunity to conform their pay practices to the requirements if they chose to claim exemption for their employees, or pay overtime premium pay. In contrast, the public sector pay policies at issue in this rulemaking evolved over the years subject to constraints in statutes, ordinances or policies based on public accountability principles that preclude paying public employees for hours not worked, under systems that regarded management employees as being exempt from overtime.

B. Legislative History of the FLSA in the Public Sector

Since...1938, the Congress and the...Court have periodically acknowledged the special circumstances of, and different treatment to be accorded to, governmental employers and employees under the FLSA, as distinguished from the private sector. Originally, the FLSA did not apply to employees of States or political

subdivisions. Congress extended coverage in 1966 to [certain] employees of State and public entities.... The...Court upheld the constitutionality of applying the Act to such entities in *Maryland v. Wirtz*, 392 U.S. 183 (1968).

In 1974, Congress extended coverage to all public sector employees, exempting only elected officials and their immediate staffs. It did so with the stated intent to cover virtually all public sector employees who were not within the scope of the section 13(a)(1) exemption....

In 1976, however, the...Court considered the special nature of State and local governments under the FLSA and ruled that the FLSA's minimum wage and overtime pay provisions could not constitutionally be applied to State and local government employees engaged in traditional governmental activities. (*National League of Cities v. Usery*, 426 U.S. 833 (1976).)....

In 1985, the Supreme Court reversed National League in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).... In response to Garcia, Congress amended the FLSA in November 1985 to address particular concerns of State and local governments and to provide relief from liability during a temporary adjustment period after the Garcia decision. New provisions were added to allow the use of compensatory timeoff in lieu of cash wages for overtime in the public sector, with a higher maximum limit on the number of hours that can be accumulated by public safety and certain other employees; to include overtime exemptions for certain employment situations in which employees work dual jobs; and to provide special rules for public agency volunteers. The 1985 Amendments did not, however, affect section 13(a)(1) of the Act or specifically address the application of the...exemption to State and

local government employees. Neither the statutory changes nor the legislative history of the 1985 Amendments contain any significant references to section 13(a)(1) or 29 CFR part 541.

C. Public Sector Pay Systems and the FLSA

Some State and local government jurisdictions operate pay policies based on constitutional or statutory provisions while others are derived from regulations or policies that have evolved over the years. The rules and procedures of many of these pay systems were in place long before FLSA coverage of the public sector brought on by the 1985 Garcia decision. Such pay systems are generally premised on a concept derived from principles of public accountability that governmental employees should not be paid for time not worked due to the need to be accountable to the taxpayers for the expenditure of public funds.

At the time of Garcia, therefore, most public employers had in place compensation systems requiring all employees, regardless of how paid, to use accrued leave time or incur a reduction in pay for any absences from work. Such Governmental payroll systems prohibited paying employees for time not actually worked that was not covered by accrued leave, regardless of whether the time not worked was greater or less than one full work-day. Thus all public employees under such systems, including highly-compensated managers who otherwise would clearly be exempt from the overtime requirements, could be classified as non-salaried and thus non-exempt. As a consequence, few public employers compensated employees in a manner that would satisfy the "on a salary basis" provision required by the regulations.

The Department first observed this anomaly when responding to written inquiries

from public sector employers following the Supreme Court's Garcia decision in 1985. It was also raised in public comments received on the Department's Advance Notice of Proposed Rulemaking (ANPR) on Part 541 published in the Federal Register on November 19, 1985 (see 50 FR 47696), before the 1985 FLSA Amendments went into effect. One issue raised in the ANPR was whether the salary tests for exemption should be increased or eliminated.

During this same time frame, the Office of Personnel Management (OPM) issued regulations on the 541 exemption for executive, administrative, and professional employees of the federal government. Under OPM's regulations, exempt status was determined according to grade level and the position classification system rather than salary, and did not include a "salary basis" requirement. With this background, the ANPR also raised the question "(s)hould the Department recognize individual State and local government civil service systems for classifying (executive, administrative, and professional) EAP employees in applying the exemption to employees of such governments?"

Two commenters responding to the ANPR pointed to the conflict between State and local laws and § 541.118 by noting that State or local laws frequently prohibit employees from being paid for time not actually worked, or not covered by annual, sick, or other types of paid leave. These commenters cited the example of an otherwise exempt public employee who is absent from work for personal reasons, or is unable to work because of illness or accident, where the employee has not accrued, or has exhausted, paid leave time, being paid only for the hours actually worked in accordance with applicable State or local law. Consequently, a public employer that makes deductions from pay

for absence(s) computed on an hourly basis would not be in compliance with the "salary basis" requirements in § 541.118 that allow for deductions to be made in such cases only for absence(s) of a full day or longer.

The Department also received comments expressing concerns about the "salary basis" requirement for exemption for public sector employers in response to proposed regulations issued to implement the 1985 FLSA Amendments (51 FR 13402; April 18, 1986). These comments were noted in the preamble to the final rule as follows:

[Noting expressed concerns about the application of the salary basis test to public employers was, in 1985 and 1986 being examined in a separate rulemaking process – which USDOL expected to finalize in 1987 – and that USDOL stated those concerns would not be considered or addressed at that time.]

D. The Department's 1987 Enforcement Policy

The Department initially attempted to address the special circumstances of the public sector by means of an enforcement policy issued by the Wage and Hour Administrator on January 9, 1987, as follows:

It has come to our attention that some State and local government jurisdictions have statutory provisions which prohibit any employee from being paid for time not actually worked, or not covered by annual, sick, or other type of paid leave. Such statutory provisions conflict with the salary basis of payment described in § 541.118 of 29 CFR Part 541. For example, where an otherwise exempt public employee is absent from work for personal reasons, or is unable to work because of illness or accident, and the employee has not accrued, or has exhausted, paid leave time, such employee is paid only for hours actually worked in accordance with applicable State or local law. This practice is similar to the practice applicable to Federal employees. Consequently, a public employer may make deductions from pay absence(s) on an hourly basis which is contrary to

the position in § 541.118 that deductions may be made only for absence(s) of a day or longer.

Revisions to the provisions of 29 CFR part 541, including the salary tests, have been under consideration as indicated in the Advance Notice of Proposed Rulemaking (ANPR) published in the Federal Register on November 19, 1985 (50 FR 47696). .... A commenter representing public employers has pointed out the problem described above and has proposed changes in § 541.118 that would allow deductions to be made for absence(s) of less than a day, or to eliminate the salary test entirely.

While consideration is being given to proposed changes in the regulations, a nonenforcement policy is being adopted with regard to the salary basis of payment for otherwise exempt public employees. Wage-Hour will not deny an exemption under section 13(a)(1) to an otherwise exempt public employee whose pay is reduced by deductions for absence(s) of less than a day for personal reasons, or because of illness or accident, because the employee does not have, or has exhausted available paid leave for such absence(s).

This nonenforcement policy will be followed only where the public employer can show that a provision contained in applicable State or local law in effect prior to April 15, 1986, prohibits payments to an employee for absence(s) of the type described above which are not covered by available paid leave. This nonenforcement policy is not intended to affect any employee's rights under section 16(b) of FLSA.

....

....

E. Developments in Private Lawsuits

[This] 1987 enforcement policy expressly stated that it was not intended to affect the rights of public employees to file private lawsuits under section 16(b) of the FLSA. [Footnote omitted.] Since the Supreme Court's Garcia decision in 1985, numerous lawsuits have been filed by public employees seeking to recover overtime premium pay from their employers, and in many of these cases the resolution of the exempt status of employees turned solely on the court's reading of the "salary basis" requirement in the regulations. The courts have interpreted

the construction of the regulations in different ways, reaching different results.

[Reiterating varying judicial interpretations noted in 56 Fed. Reg. 45824 (September 6, 1991).]

Such judicial interpretations and accompanying confusion were exposing governmental employers to potentially enormous and generally unexpected back wage liabilities for many employees who would clearly be exempt but for the treatment of leave and the docking of pay for partial-day absences when leave was unavailable. Following the denial of certiorari (January 1991) and petition for rehearing (March 1991) in Abshire, representatives of State and local governments,...presented their u[r]gent concerns to the Department arising from the flood of lawsuits being filed by public employees and requested prompt action by the Department to address the matter in light of the anticipated effects of post-Abshire litigation.

These State and local government representatives indicated that, without immediate action by the Department of Labor to revise the regulations for State and local governments, the potential liabilities for affected governmental entities would become devastating. They expressed concern over the fundamental inequity of courts granting windfall awards of across-the-board retroactive overtime payments to public employees who never had any actual deductions made in their salaries, along with employees who rarely had such deductions, but all of whom would be entitled to substantial back pay under Abshire simply because their salaries were theoretically "subject to" the possibility of docking.[8] They asserted that this resultant windfall was not required by [sic], and that

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[8]Mayor David Dinkins of New York City described the situation in an August 14, 1991 letter to Secretary of Labor Lynn Martin as follows:

The City of New York, along with many other jurisdictions, faces serious fiscal problems. To meet those

problems we have already cut services and laid off thousands of employees. The layoff of State and local government Abshire [v. County of Kern, 906 F.2d 483, (9th Cir. 1990), *cert. denied*, 111 S.Ct. 785, *rehearing denied*, 111 S.Ct. 1341 (1991) which held exemptions were lost even if no deductions had actually been made so long as deductions could have been made] was an extreme interpretation of, DOL's regulations. [Summary of views presented by State and local representatives.]....

F. The Department's September 1991 Rulemaking

Because of concerns that the unexpected liabilities threatened to seriously impair the fiscal integrity of many State and local governmental agencies, and would disrupt widespread, long-standing pay practices that had been designed to serve the public trust, the Department undertook separate rulemaking on the specific issue of application of the "salary basis" rule to public sector employees, while continuing its overall review of the full range of issues under 29 CFR part 541 raised by the public comments submitted on its ANPR of November 19, 1985 (50 FR 47696). Recognizing the special circumstances of public sector employment, under which employees are paid pursuant to pay systems established according to principles of public accountability, and in light of the potentially enormous, unforeseen liability which could threaten the governments' fiscal integrity as a result of retroactive overtime

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employees has been cited by the staff of the Federal Reserve Board as a reason for the continuing weakness in the economy. To exacerbate those fiscal problems and those layoffs to pay overtime to management employees because of the application to the public sector of a regulation designed for the private sector would be contrary to the public interest.

payments to public employees considered exempt by their employers, the Department proceeded with rulemaking on an expedited basis, finding good cause to waive the normal requirement for prior notice and comment.

The Department published an Interim Final Rule (IFR) on September 6, 1991 (56 FR 45824), inviting public comments for 30 days, modifying the "salary basis" rules affecting eligibility for exemption under section 13(a)(1) of FLSA for employees in the public sector only. The Department issued the IFR to allow State and local governments to continue their public-accountability pay systems without incurring liability for overtime pay under FLSA to employees who would otherwise be exempt from the overtime pay requirements. A new § 541.5d was added to the regulations to provide that an otherwise exempt public sector employee who is paid according to a pay system that requires the use of paid leave for partial-day absences for personal reasons or due to illness or injury and, when leave is not used or is exhausted, reduces the employee's pay for such absences of less than one full work-day, will not be disqualified from exemption due to such pay system. The rule also provided that the exemption would not be defeated by deductions from salary caused by budget-required furloughs that are not regular and recurring, except in the workweek in which a deduction occurs. The Department left all other aspects of the salary test unchanged, as well as the duties and responsibilities tests of the exemption, as applied to employees in the public sector.

The Department also published a Notice of Proposed Rulemaking (NPRM) on the same day (56 FR 45828; September 6, 1991), inviting public comment for 30 days on a separate proposal at 29 CFR 541.118(a)(6)(ii) to allow public sector employers with pay systems as specified in the IFR, under which past deductions were made in the pay of otherwise exempt public employees for absences of less than one work-day for personal reasons or due to sickness or injury, to reimburse the employees for those deductions that occurred before the IFR went into effect and thereby restore the employees' eligibility for exemption. The regulatory proposal also provided that the "salary basis" component of the exemption would not be disallowed under such pay systems where no actual deductions were made before the IFR went into effect. Upon review of the comments submitted on the NPRM, the Department is withdrawing the proposal from further consideration and it will not be implemented as a final rule. See, published elsewhere in today's Federal Register, a document that withdraws this NPRM. The Department will be proposing a legislative remedy to address such retroactive liability.

[The comment period was extended and USDOL received 398 comments and numerous other comments beyond the scope of the proposed 29 C.F.R. § 541.5d.] Several comments were also received suggesting revisions or review of other aspects of Regulations, 29 CFR part 541, including its application to the private sector. Some private sector commenters have suggested that modern compensation practices, especially those adopted to provide increased flexibility in the workplace and to reduce artificial distinctions among classes of employees, have made the salary basis test anachronistic.

The Department is currently reviewing these comments, as well as those received in response to the 1985 ANPR, in order to determine what further rulemaking proceedings may be appropriate with regard to these and the other issues raised.

With regard to the public sector, which is the subject of this rulemaking, it is clear to the Department, after review of all of the comments, that certain aspects of the "salary basis" test for distinguishing exempt from nonexempt employees did not serve their intended purpose when applied to the public sector, as aspects of the "salary basis" requirement are unduly restrictive when applied in the public sector. In the Department's view, these aspects are not valid indicators of the bona fides of a claimed exemption...in the public sector where every employee may theoretically be subject to potential docking for partial-day absences. State and local governments were thus being inappropriately deprived of the opportunity to apply the section 13(a)(1) exemption to their employees who would otherwise be properly exempt. For these reasons, the Department is of the view that public sector pay systems have to be analyzed differently from private sector pay systems.

The major comments received on the current rulemaking are summarized below, together with a discussion of the significant changes that have been made in the final regulatory text in response to the comments received. A number of comments were submitted that focused on issues in the regulations on which the Department had not proposed changes or invited public comment, which the Department will not be addressing at this time. However, to the extent appropriate, the Department will consider these views in the

context of its overall review of the full range of issues being considered in connection with the Department's November 1985 ANPR and February 1992 Request for Information.

III. Summary of Major Comments

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Comment: Clarify the applicability of the remaining elements of the "salary basis" test.

Several commenters [said] that it was not clear that public employers continued to remain subject to all other aspects of the "salary basis" test in the regulations, stating that some public employers have attempted to argue in pending lawsuits that the Department's interim final rule completely eliminated all aspects of the "salary basis" test in the public sector.

The Department's interim final rule did not eliminate altogether the "salary basis" test in the public sector. A public sector employer must still be able to demonstrate that a claimed exempt employee satisfies all other aspects of the "salary basis" requirements for exemption. The interim final rule states specifically that to be exempt under the new exception an employee must be one "* * * who otherwise meets the requirements of § 541.118 * * *," the regulation which defines payment on a salary basis. .... Only partial-day deductions from pay when leave was not used or was exhausted and furlough-required deductions were addressed by the interim final rule. All other aspects of the salary test were left unchanged for the public sector, as these commenters pointed out.

Comment: The method used by the Department of Labor to consider and issue the rules was unfair and improper.

....

It had become apparent to the Department, as a result of court decisions in private litigation and the communications it

received, that the previously existing rules and enforcement policy were inadequate for effectuating the statutory exemption in the public sector. The availability of the exemption to public employers was increasingly sharply limited, contrary to the expressed intent of Congress in the 1974 Amendments. Public sector employers were accordingly being confronted with unexpected liabilities in very substantial amounts for employees considered exempt by their employers, and who assertedly would have been exempt but for the public accountability pay systems established well before extension of the Act to public sector employees. Because such awards could threaten State and local governments' fiscal integrity, the Department determined it was appropriate to change the "salary basis" rule on an interim basis so as to forestall additional liability while comments were received and considered in the process of developing and promulgating any final rule.

Comment: It is inappropriate to apply the section 13(a)(1) exemption for public sector employers differently than for private sector employers.

A number of commenters...suggested that there is no basis for the Department to distinguish between the private and public sectors under the section 13(a)(1) exemption. Some of these commenters pointed to the 1985 FLSA Amendments as clear evidence that the lack of attention to this issue by Congress in those Amendments reflected a specific Congressional intent not to distinguish between these two types of employment for purposes of applying section 13(a)(1) of the Act. Another commenter...stated that the 1974 FLSA Amendments demonstrate that Congress intended to extend the same, equal protection to

employees in the public and private sectors. One other commenter...suggested that the Department could have encouraged public employers to alter their policies concerning deductions of less than a day or that less drastic remedial measures could have been taken, such as altering the regulations to require that an actual deduction of pay occur before the exemption is lost.

The regulations defining the section 13(a)(1) exemption, largely in their present form, were adopted long before Congress extended the rights and protections of the FLSA to employees in the public sector.[11] Thus, the practice of docking public employees' pay for partial-day absences when paid leave was not available was not initially a concern in the administration of section 13(a)(1) of the FLSA.

Significantly, the existing regulatory requirements were adopted following public hearings in the 1940's and 1950's, which included evidence from witnesses showing that bona fide executive, administrative, and professional employees in the industries at that time subject to the FLSA were almost universally paid on a salary basis. These fact-based inquiries, conducted before the public sector became subject to the FLSA, did not include an examination of prevailing governmental pay practices. The historical record based on contemporaneous evidence also indicated that employees who did not meet the salary test generally also did not meet the other requirements of the exemption. The opposite is true with respect to the Department's current rulemaking, which was intended to address prevailing public sector pay systems operating

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[11]The general requirement that an exempt employee be paid "on a salary basis" has been an integral part of the regulations since 1940, and 29 CFR 541 118 ("salary basis") has remained essentially unchanged since revisions were last made in 1954.

under statute, ordinance, regulation, or other established public policy requiring all employees, including otherwise-exempt managers and executives, to use accrued leave time or incur a reduction in pay for any absences from work.

When FLSA coverage was extended to include public sector employees, separate provisions were not added to the regulations to define the section 13(a)(1) exemption in a manner that would distinguish public from private sector employment.

However, it is clear from a plain reading of FLSA's legislative history in 1974...that Congress intended for the section 13(a)(1) exemption to be available for public sector employees. Congress presumably was unaware that, because many public sector compensation systems preclude payment for hours not worked, these systems would, solely for that reason, be found to fail to meet the regulatory "salary basis" component of the exemption. In light of the public accountability principles prevalent in public sector pay systems, the regulatory requirements adopted before Congress extended FLSA coverage to State and local governments simply could not operate in a manner that effectively distinguished exempt from non-exempt public employees. The regulations were thus out of harmony with the intent of the statute because State and local governments could not practically avail themselves of the exemption intended by Congress, and thus were inappropriate as applied in the public sector.

The fact that public sector employers had pay systems that prevent them from paying employees for part-day absences when paid leave

is not available, and thus could invalidate the exemption for all employees "subject to" such pay systems under the principles set forth in Abshire, was not generally recognized to be the problem it is today when the 1985 Amendments were enacted. The 1985 legislation's silence on this issue is not indicative, in the Department's view, of an intent to make the section 13(a)(1) exemption unavailable to public sector employers because of the nature of their pay systems.

Congress expressly authorized the Secretary of Labor to prescribe the requirements for exemption under section 13(a)(1) of the Act.... Had Congress felt that the Department should not be free to revisit and revise its regulations in the future based on its enforcement experiences, it would have amended the statute to remove the Secretary's discretion.... The Congress has not made such a change throughout the history of the Act despite the numerous opportunities by the Congress over the years to amend section 13(a)(1).

Furthermore, the regulations promulgated immediately after enactment of the FLSA to implement section 13(a)(1) of the Act contained a section entitled "Petition for amendment of regulations" which provided, in part, that:

> (I)n determining * * * future regulations, separate treatment for different industries and for different classes of employees may be given consideration.

This provision has remained a part of the regulations throughout their history. See 29 CFR 541.6 (1991). The Department has always had authority under these regulations to consider separate treatment of the public sector.

In light of the court decisions and representations by affected parties, the Department has determined that strictly

applying all aspects of the salary basis rule to the public sector...has produced results that do not effectuate the intended purposes of the Act. The Department considers it inconsistent with Congressional intent and inappropriate that the exemption be denied in the public sector to virtually all employees solely because their pay is subject to deduction for partial day absences where paid leave is not used, pursuant to pay systems that were established according to principles of public accountability, and, in some cases, imposed by law, ordinance or regulation, even before Congress extended the Act's coverage to the public sector. As a result, the Department has determined that these specific elements of the "salary basis" test are not valid indicators in the public sector of the bona fides of a claimed exemption under section 13(a)(1), and the revisions herein are necessary in order to give effect to the statutory exemption in the public sector as intended by Congress under the 1974 Amendments.

It is important to note that public pay systems, in many cases, are the result of requirements in State constitutions and statutes, civil service systems, city charters and ordinances, or regulations. Even if it were procedurally possible to change personnel policies through amendments to constitutions and charters and the repeal of all applicable laws and ordinances, it appears to the Department that the changes in public policy and tradition required for governments to conform to the Department's salary basis requirements, as interpreted by the Abshire court, are not consistent with the public accountability principles supported and required by the public. Thus, with respect to AFSCME's suggestion that the regulations could have been revised to require an actual deduction in pay for the

exemption to be lost, principles of public accountability embodied in the need to be accountable to the taxpayers for the expenditure of public funds only for hours actually worked require that the exemption criteria for the public sector take into account the fact that the pay systems at issue reduce pay for partial-day absences when leave is exhausted. As initially expressed in the preamble of the IFR, the Department's understanding that public sector employers necessarily must be held to a higher standard of accountability regarding the use of public funds in paying public employees was confirmed by the comments received during the rulemaking process. Consequently, to limit the rule to disallowing exemption in those workweeks that pay is reduced for absences not covered by available paid leave, as suggested, would simply not be responsive and would result in a rule that remains inadequate for appropriately distinguishing exempt from non-exempt employees in the public sector.

....

Comment: The "salary basis" test should be deleted for public sector employees.

Four commenters...suggested that the "salary basis" test should be deleted altogether, or made inapplicable as in Senate Bill S. 1670, ...102nd Cong., 1st Sess., or replaced with a minimum salary level, increased from present levels, above which the "salary basis" test would not apply.

The Department's IFR was narrowly drafted in response to a demonstrated need to specifically address the particular fact that the existing "salary basis" test in the regulations produced inappropriate results when applied to public sector compensation systems which, based on principles of public accountability, reduce pay for partial-day absences for personal reasons

or due to sickness or injury when leave is not used. All other requirements of the salary test were left unchanged as applied to employees in the public sector. Sufficient justification has not been shown in the comments to warrant eliminating altogether the "salary basis" requirement or making it inapplicable to public sector employees paid above some minimum "upset" salary level.

....

Comment: § 541.118(a)(5) regarding deductions for penalties imposed for infractions of safety rules of major significance should be broadened to include disciplinary suspensions of public sector employees.

Several commenters...stated that disciplinary situations are unique in the public sector, particularly in organizations like police departments, or different from those of the private sector because public employers have less freedom to terminate employees absent extraordinary circumstances and thus must use disciplinary suspensions without pay to rehabilitate or control behavior; that public employers have virtually no other penalty options; and that suspension for a full week, which can be done without jeopardizing exempt status, is rarely imposed because of its severity. One commenter...suggested that disciplinary systems promulgated by statute, ordinance, administrative order, standard procedure, or collective bargaining should be treated in the same manner as the new regulation treats deductions for partial-day absences. One commenter...noted that such disciplinary systems were in place at the time of the Garcia decision and are premised on the concept that public employers should be accountable to the taxpayers for the conduct of public employees. Another commenter...stated that failure to allow

disciplinary deductions in the case of exempt employees could result in inconsistent application of discipline among exempt and non-exempt employees.

In the Department's judgment, the comments have not suggested a sufficient basis for distinguishing between the public and private sectors with respect to any recommended change in the rule. Although contrary assertions were made, the comments failed to demonstrate that public employers are significantly more restricted in the availability of options with respect to employee discipline than private employers. Although public employee terminations may require compliance with procedures designed to protect employee rights, termination for disciplinary reasons is not generally unavailable. In addition, other remedies for disciplinary infractions, such as official reprimands, demotions, and reassignment or restriction of duties, are generally available and used in the public sector.

Section 541.118(a)(5) was not open for comment during the present rulemaking. However, the Department expects to consider this issue as appropriate in proposed revisions of Part 541 at a later date.

....

Comment: The phrase "* * * established by statute, ordinance, regulation or public policy * * *" should be deleted or clarified.

....

The purpose of the phrase in question was to enable public sector employers to operate pay systems based on principles of public accountability without incurring unanticipated overtime liabilities to employees who would otherwise be exempt but for the practice of docking pay for partial-day absences when leave was not used. However, it is the Department's

view that the relief contemplated by the rule should only be available where the policy or practice of docking pay when leave is not used is based on principles of public accountability, as the record demonstrates is generally the case. Public accountability is a broad concept that forms the foundation for many governmental administrative practices, including most public sector pay systems, and is derived from the desires of taxpayers that their government be accountable to them for expenditures from the public treasuries. Public accountability embodies the concept that elected officials and public agencies are held to a higher level of responsibility under the public trust that demands effective and efficient use of public funds in order to serve the public interest. It includes the notion that the use of public funds should always be in the public interest and not for individual or private gain, including the view that public employees should not be paid for time they do not work that is not otherwise guaranteed to them under the pertinent civil service employment agreement (such as personal or sick leave), and the public interest does not tolerate wasteful and abusive excesses such as padded payrolls or "phantom" employees. In response to the comments received, the Department is clarifying in the final rule what was intended by "public policy" by substituting the phrase "policy or practice established pursuant to principles of public accountability."

....

OTHER USDOL PRONOUNCEMENTS

H. Weiss, Report and Recommendations on Proposed Revisions of Regulations, Part 541 24-26 (USDOL1949) (the Weiss Report) states, in relevant part:

....

The notice of hearing invited evidence on the need for revision or definition of the term "on a salary * * * basis." .... The evidence at hearing showed clearly that bona fide executive, administrative, and professional employees are almost universally paid on a salary or fee basis. Compensation on a salary basis appears to have been almost universally recognized as the only method of payment consistent with the status implied by the term "bona fide" executive. Similarly, payment on a salary (or fee) basis is one of the recognized attributes of administrative and professional employment. The proposals to eliminate the requirement and to apply an hourly rate or average earnings test may therefore be rejected as inconsistent with true executuve, administrative or professional status.

A number of questions have arisen in the past in connection with the interpretation of the phrase "on a salary * * * basis" particularly with respect to the effect of deductions on the salaried status of an employee. The problem became of some importance during the war when the practice of making such deductions was adopted by some companies engaged in war production as a disciplinary measure to discourage absenteeism among executive and adminsitrative employees. This practice raised serious questions as to whether any employees to whom it was applied were actually employed "on a salary * * * basis" in accordance with the provisions of the regulations. Investigation by the Divisions indicated that this changed practice had become sufficiently widespread to warrant the conclusion that the wartime industrial practice differed from the pre-war practice and that such disciplinary deductions were no longer inconsistent with payment "on a salary * * * basis." In an effort

to meet the wartime problems and to clarify the meaning of the term "on a salary * * * basis" the Divisions issued a restatement of position, the pertinent portion of which follows:

> ....[T]he fact that less than [an exempt's employee's predetermined amount] is paid for a particular pay period because disciplinary deductions are made for unreasonable absences would not in itself prove that the employee is not employed on a salary basis. [Nonetheless, exempt employes must be given more latitude in taking absences than non-exempt employees.]

As a result of this statement of position, the problems created by the pecluliar wartime conditions in many plants were solved but as an incident thereof, numerous administrative difficulties were encountered. For example, employers as well as the Divisions were faced with the need for determining in particular cases whether absences were reasonable or unreasonable and whether unreasonable absences included absences for longer periods than were allowed under established company plans for sick leave and "annual" leave. Since the answer to this latter question was determined to depend upon the reasonableness of the particular leave plan, employers had to decide for themselves and the Divisions in many instances were compelled to rule on specific leave plans to determine whether the leave plans were "reasonable" in nature. Employers were thus subject to considerable uncertainty prior to obtaining the opinion of the Divisions and the Divisions were faced with an undesirable administrative burden given such opinions. In my opinion, moreover,

the building of such an elaborate structure of interpretation upon the simple phrase "on a salary * * * basis" should be avoided if possible in the interests of good administration.

The testimony at the hearings indicated that the practice of disciplining bona fide executive, administrative, and professional employees by making deductions from their salaries had been a wartime phenomenon, resulting from rapid upgrading, the pressure of long hours, and other temporary conditions. Such deductions are rarely made today. The disciplining of such employees in the rare instances where it is needed is usually accomplished in other ways than by deductions from salary. There appears to be no present need for a definition of "salary basis" as difficult to apply as the one now followed by the Divisions, particularly since it is not consistent with the common understanding of the phrase as it applies to bona fide executive, administrative, and professional employees. In view of the changed conditions, payment of anything less than the full salary seemd to cast doubt upon the bona fide character of the employee's executive, administrative, and professional status.

....

USDOL Letter Ruling for March 29, 1991 (Fair Labor Standards Handbook, pp. 301-302, App. III (Thompson Publishing Group, Inc. 8/91) states, in relevant part:

....

You state that your client is a hospital [which] does not make deductions from [RNs'] salaries for absences of less than one day in accordance with section 541.118 of the regulations. However, the [applicable collective bargaining agreement] permits suspensions without pay from one to five days should the

RNs violate the hospital's of the State's rules governing health care employees. These rules address concerns of patient well-being, safety and job performance. The rules require safe and competent performance of assigned duties as well as prompt and regular attendance when the RNs are scheduled for work.

Q. 1. May the hospital suspend a RN for disciplinary reasons without pay for one full week notwithstanding payment of a salary on a biweekly basis without affecting the employee's exempt status?

A. 1. .... An employee may qualify as a bona fide professional employee if all the pertinent tests relating to duties, responsibility, and salary, as discussed in section 541.3 of the regulations, are met....

Section 541.118(a) states, in part, that an employee need not be paid for any workweek in which he or she performs no work. Therefore, the answer to your first question is in the affirmative.

Q. 2. May the hospital suspend an Rn for period sof less than one week but for one or more days without affecting the employee's exempt status?

A. 2. .... The only disciplinary type of deduction permissible is one imposed as a penalty "in good faith for infractions of safety rules of major significance." As explained in section 541.118(a)(5), safety rules of major significance embrace those intended to prevent serious danger to the workplace or to other employees, including smoking in explosive plants, oil refineries, and coal mines. This has also been construed to cover industrial security

regulations promulgated by a government agency.

Disciplinary deductions made from the salary of an RN for violating rules relating to patient well-being and job performance are not the type of deductions that would be permitted.... There is not enough information [to determine whether safety rules of major significance are implicated.]